IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 942

KEVIN L. DONALDSON, f/k/a
MERTON H. SWEET,

Petitioner,

v.

UNITED STATES, ET AL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 11, 1969
CERTIORARI GRANTED FEBRUARY 27, 1970

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

November 25, 1968—Petitioners, United States of America and John P. Grady filed its Petition to Enforce Internal Revenue Service Summons against Respondent, Joseph J. Mercurio.

November 29, 1968—Petitioners filed an Order to Show Cause against Respondent, Joseph J. Mercurio; the Court entered its order setting for hearing the Order to Show Cause.

December 9, 1968—Intervenor, Kevin L. Donaldson, filed his Motion to Intervene as Respondent and Answer.

December 9, 1968—Respondent, Joseph J. Mercurio, filed his Response to Petition.

January 10, 1969—Petitioners, United States of America and John P. Grady, filed its Opposition to Motion to Intervene.

January 10, 1969—Hearing was had on Kevin L. Donaldson's Motion to Intervene as Respondent.

January 16, 1969—The Court entered its order denying Kevin L. Donaldson's Motion to Intervene.

January 16, 1969—The Court entered its order directing Respondent, Joseph J. Mercurio, to comply with the Internal Revenue Summons.

January 16, 1969—Intervenor, Kevin L. Donaldson, filed a Motion to Stay the Effective Date of the Court's Order Pending Appeal. This Motion was granted on said date.

January 16, 1969—Intervenor, Kevin L. Donaldson, filed his Notice of Appeal.

January 17, 1969—Petitioner, United States of America, filed a Motion to Consolidate.

January 20, 1969—The Court entered its order granting consolidation for purpose of appeal.

(Revelant docket entries in Acme Circus Operating Company, Inc. are identical to those set forth above.)

October 30, 1969—Opinion and Judgment of the Court of Appeals for the Fifth Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

UNITED STATES OF AMERICA and JOHN P. GRADY, *Petitioner,*

v.

JOSEPH J. MERCURIO, *Respondent.*

No. 68-490—Civ. T.

PETITION TO ENFORCE INTERNAL REVENUE SERVICE SUMMONS

Filed Nov. 25, 1968.

The United States of America and John P. Grady, by and through their attorney, Edward F. Boardman, United States Attorney for the Middle District of Florida, and show unto this Court as follows:

I

This is a proceeding brought under authority of Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, to judicially enforce an Internal Revenue Service summons.

II

The petitioner, John P. Grady, is a Special Agent of the Internal Revenue Service employed in the Intelligence Division of the Office of the District Director of Internal Revenue in Tampa, Florida.

III

The respondent, Joseph J. Mercurio maintains a business address at 713 South Orange Avenue, Sarasota, Florida.

IV

The petitioner, John P. Grady, is assisting in an investigation being conducted by Special Agent Bruce B. Miller for the purpose of ascertaining the correct income tax liability of Merton H. Sweet, a/k/a Kevin L. Donaldson, for the years 1964 through 1967, inclusive, as is set out in Exhibit A.

V

On September 12, 1968, an Internal Revenue Service summons, a copy of which is attached hereto as Exhibit B, was issued by Special Agent John P. Grady, directing the respondent, Joseph J. Mercurio, to appear at Room 112, Federal Building, 111 South Orange Avenue, Sarasota, Florida, before Special Agent John P. Grady on September 23, 1968, at 3:00 p.m., to testify and to produce for examination certain books, records, and papers, all of which are described in the summons attached hereto as Exhibit B. Said summons was personally served on respondent, Joseph J. Mercurio on September 12, 1968, as is set out in the affidavit of Special Agent John P. Grady, attached hereto as Exhibit C.

VI

Thereafter, on September 13, 1968, in Civil Action No. 68-373-T United States District Judge Ben Krentzman entered an order restraining the respondent, Joseph J. Mercurio, from complying with the summons herein involved until ordered to do so by a Court of competent jurisdiction.

VII

On September 23, 1968, the respondent failed to comply with the summons attached hereto as Exhibit B because of the restraining order described in paragraph VI above.

WHEREFORE, the petitioners United States of America and John P. Grady, respectfully pray:

1. That the Court enter an order directing the respondent Joseph J. Mercurio, to show cause, if any he has, why he should not comply with and obey the summons attached hereto as Exhibit B in each and every requirement thereof.

2. That this Court order the respondent, Joseph J. Mercurio, to appear for the purpose of giving testimony concerning the tax liability of Merton H. Sweet, a/k/a Kevin L. Donaldson, as to each or any of the tax years 1964 through 1967; and that this Court order the attendance and production of the records, as is required and called for by the terms of the summons, before the petitioner, John P. Grady, or any other proper officer of the Internal Revenue Service at such time and place as may be hereafter fixed by said John P. Grady, or any other proper officer of the Internal Revenue Service.

3. That this Court grant such other relief it deems appropriate in the premises.

EDWARD F. BOARDMAN
United States Attorney
By: /s/ Thomas G. Wilson
THOMAS G. WILSON
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail this 25th day of November, 1968, to: Edward H. Heller, Esquire, 615 Madison, Tampa, Florida, Attorney for Merton H. Sweet, a/k/a Kevin L. Donaldson.

/s/ Thomas G. Wilson
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

EXHIBIT A

AFFIDAVIT OF BRUCE B. MILLER
Filed Nov. 25, 1968

[Caption Omitted in Printing]

STATE OF LOUISIANA }
PARISH OF ORLEANS } SS

BRUCE B. MILLER, being first duly sworn, deposes and says:

1. He is a Special Agent employed in the Intelligence Division of the Office of the District Director of Internal Revenue in New Orleans, Louisiana.

2. In his capacity as Special Agent, he is conducting an investigation for the purpose of ascertaining the correct income tax liability of Merton H. Sweet, a/k/a Kevin L. Donaldson for the years 1964 through 1967, inclusive.

3. As part of the aforesaid investigation, he requested that the Office of the District Director in Jacksonville, Florida, assist him in obtaining information regarding the financial transactions between the Acme Circus Operating Company and the taxpayer Merton H. Sweet, a/k/a Kevin L. Donaldson.

4. As part of this investigation the Internal Revenue Service summons attached hereto as Exhibit B was issued and served.

5. It is necessary to examine the books, papers and other records listed in the Internal Revenue Service summons attached hereto as Exhibit B and to take the testimony of Joseph J. Mercurio in order to ascertain the correct income tax liability of Merton H. Sweet, a/k/a Kevin L. Donaldson, for the years 1964 through 1967, inclusive.

/s/ Bruce B. Miller
BRUCE B. MILLER
Affiant

Subscribed and sworn to before me this 18th day of November, 1968.

/s/ Carl A. Dengel
NOTARY PUBLIC

In and for said state and parish
My commission expires:
CARL A. DENGEL

Notary Public, Parish of Orleans, State of La.
My Commission is issued for life.

EXHIBIT B

Form 2039
(Rev. Nov. 1965)

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

SUMMONS

In the matter of the tax liability of

Merton H. Sweet
a/k/a Kevin L. Donaldson
2444 Primeaux Drive, Apt. 94
New Orleans, Louisiana 70114

Internal Revenue District of New Orleans

PERIOD(S) 1964 through 1967

THE COMMISSIONER OF INTERNAL REVENUE

TO: Joseph J. Mercurio
713 South Orange Avenue
AT: Sarasota, Florida

GREETINGS:

You are hereby summoned and required to appear before me an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the time and place hereinafter set forth:

The following records in your possession of Acme Circus Operating Company, Inc., d/b/a Clyde Beatty-Cole Bros. Circus, that relate to Merton H. Sweet, a/k/a Kevin L. Donaldson:

1. Copies of any applications for employment and/or any other records containing background data including Social Security number furnished you by Merton H. Sweet, a/k/a Kevin L. Donaldson.

2. Copies of any and all contracts between Merton H. Sweet, a/k/a Kevin L. Donaldson, and the Acme Circus Operating Company, Inc., and between Merton H. Sweet, a/k/a Kevin L. Donaldson, and the various organizations sponsoring performances of the circus in their respective cities during the years 1964 through 1967, inclusive.

(See Next Page)

Place and time for appearance:

At Room 112, Federal Building, 111 South Orange Avenue, Sarasota, Florida 33577

on the 23 day of September

19 68, at 3:00 o'clock P. M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States Commissioner to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code

this 12 day of September, 19 68

ORIGINAL

SIGNATURE: John P. Grady

TITLE: JOHN P. GRADY
Special Agent

6

RTIFICATE OF SERVICE OF SUMM 'NS

(Pursuant to Section 7603, Internal Revenue Co

I hereby certify that I served the summons on the reverse hereof

DATE SUMMONS SERVED (Day, month, year)	TIME
Sept. 12 1962	2:45 P.M.

HOW SUMMONS WAS SERVED (Check one)

☒ I handed an attested copy thereof to the person to whom it was directed,

Mr. Joseph J. Maurer

☐ I left an attested copy thereof with the following person at the last and usual place of abode of the person to whom it is directed,

SIGNATURE	TITLE
John P. Reidy	Special Agent

Sec. 7603. SERVICE OF SUMMONS.

A summons issued under section 6420(e)(2), 6421(f)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

In Re: Merton H. Sweet
a/k/a Kevin L. Donaldson
2448 Primeaux Drive, Apt. 94
New Orleans, Louisiana, 70114 (cont'd)

3. Copies of all Forms 1099 and Forms W-2 issued to Merton H. Sweet, a/k/a Kevin L. Donaldson, during the years 1958 through 1967, inclusive.

4. A transcript or schedule setting forth the date, [illegible] and purpose of each payment made to Mer[illegible] Sweet, a/k/a Kevin L. Donaldson, by the organizations sponsoring performances of the circus during the years 1964 through 1967, inclusive.

5. Copies of all cancelled checks, cash vouchers or other records relating to payments to Merton H. Sweet, a/k/a Kevin L. Donaldson, for any purpose by Acme Circus Operating Company, Inc., during the years 1964 through 1967, inclusive.

6. Transcript or schedule or other records containing or relating to the purpose of each cancelled check issued by Acme Circus Operating Company, Inc. to Merton H. Sweet, a/k/a Kevin L. Donaldson, for any purpose for the years 1964 through 1967, inclusive.

7. Copies of all expense vouchers submitted by Merton H. Sweet, a/k/a Kevin L. Donaldson, during the years 1964 through 1967, inclusive.

8. Copies of any records containing information relating to the identification of each sponsoring organization and city where Merton H. Sweet, a/k/a Kevin L. Donaldson, promoted the Clyde Beatty-Cole Bros. Circus during the years 1964 through 1967, inclusive.

9. Copies of correspondence or other records relating to the foregoing or to any other financial transactions between Acme Circus Operating Company, Inc. and Merton H. Sweet, a/k/a Kevin L. Donaldson, during the years 1964 through 1967, inclusive.

/s/ John P. Grady

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

EXHIBIT C

AFFIDAVIT OF JOHN P. GRADY
Filed Nov. 25, 1968

[Caption Omitted in Printing]

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH } SS

JOHN P. GRADY, being first duly sworn, deposes and says:

1. He is a Special Agent employed in the Intelligence Division of the District Director of Internal Revenue in Tampa, Florida;

2. In his capacity as Special Agent, he is assisting in the conduct of an investigation for the purpose of ascertaining the correct income tax liability of Merton H. Sweet, a/k/a Kevin L. Donaldson, for the years 1964 through 1967, inclusive;

3. As part of the aforesaid investigation, on September 12, 1968, he issued an Internal Revenue Service summons to Joseph J. Mercurio directing him to appear before him at Room 112, Federal Building, 111 South Orange Avenue, Sarasota, Florida, on September 23, 1968, and to produce for examination —

> "The following records in your possession of Acme Circus Operating Company, Inc., d/b/a Clyde Beatty-Cole Bros. Circus, that relate to Merton H. Sweet, a/k/a Kevin L. Donaldson:
>
> 1. Copies of any applications for employment and/or any other records containing back-

ground data including Social Security number furnished you by Merton H. Sweet, a/k/a Kevin L. Donaldson.

2. Copies of any and all contracts between Merton H. Sweet, a/k/a Kevin L. Donaldson, and the Acme Circus Operating Company, Inc., and between Merton H. Sweet, a/k/a Kevin L. Donaldson, and the various organizations sponsoring performances of the circus in their respective cities during the years 1964 through 1967, inclusive.

3. Copies of all Forms 1099 and Forms W-2 issued to Merton H. Sweet, a/k/a Kevin L. Donaldson, during the years 1958 through 1967, inclusive.

4. A transcript or schedule setting forth the date, amount and purpose of each payment made to Merton H. Sweet, a/k/a Kevin L. Donaldson, by the organizations sponsoring performances of the circus during the years 1964 through 1967, inclusive.

5. Copies of all cancelled checks, cash vouchers or other records relating to payments to Merton H. Sweet, a/k/a Kevin L. Donaldson, for any purpose by Acme Circus Operating Company, Inc., during the years 1964 through 1967, inclusive.

6. Transcript or schedule or other records containing or relating to the purpose of each cancelled check issued by Acme Circus Operating Company, Inc. to Merton H. Sweet, a/k/a Kevin L. Donaldson, for any purpose for the years 1964 through 1967, inclusive.

7. Copies of all expense vouchers submitted by Merton H. Sweet, a/k/a Kevin L. Donald-

son, during the years 1964 through 1967, inclusive.

8. Copies of any records containing information relating to the identification of each sponsoring organization and city where Merton H. Sweet, a/k/a Kevin L. Donaldson, promoted the Clyde Beatty-Cole Bros. Circus during the years 1964 through 1967, inclusive.

9. Copies of correspondence or other records relating to the foregoing or to any other financial transactions between Acme Circus Operating Company, Inc. and Merton H. Sweet, a/k/a Kevin L. Donaldson, during the years 1964 through 1967, inclusive."

and directing said Joseph J. Mercurio to testify concerning the tax liability of said Merton H. Sweet, a/k/a Kevin L. Donaldson, as to each or any of the years 1964 through 1967. A copy of said summons is attached to these pleadings as Exhibit B.

4. On September 12, 1968, he served the Internal Revenue Service summons described in paragraph 3 above on the respondent, Joseph J. Mercurio, by personally handing an attested copy thereof to the respondent, Joseph J. Mercurio.

5. On September 23, 1968, the respondent failed to comply with the summons because of the restraining order entered by the Federal District Court for the Middle District of Florida in Civil Action No. 68-373-Civ.-T. The respondent's refusal to comply with the summons continues to the date of this affidavit.

6. It is necessary to examine all the books, papers and records demanded in the summons and to take the testimony of the respondent, Joseph J. Mercurio, in order

to ascertain the correct income tax liability of Merton H. Sweet, a/k/a Kevin L. Donaldson, for the years 1964 through 1967, inclusive.

/s/ John P. Grady
JOHN P. GRADY
Affiant

Subscribed and sworn to before me this 25th day of November, 1968.

/s/ Vera E. Atkins
NOTARY PUBLIC
In and for said state and county

My Commission expires: Oct. 26, 1970

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

ORDER TO SHOW CAUSE

Filed Nov. 29, 1968

[Caption Omitted in Printing]

Upon the petition, the exhibit attached thereto, the affidavits of John P. Grady, Special Agent of the Internal Revenue Service, and Bruce B. Miller, Special Agent of the Internal Revenue Service, and upon the motion of the United States Attorney, Edward F. Boardman, United States Attorney for the Middle District of Florida:

IT IS ORDERED that Joseph J. Mercurio appear before the United States District Court for the Middle District of Florida in that branch thereof presided over by the undersigned in his courtroom in the United States Courthouse in Tampa, Florida, on December 20th, 1968, at 4 p.m., to show cause why he should not comply with and obey the Internal Revenue Service summons served upon him on September 12, 1968, by Special Agent John P. Grady by producing the records demanded and testifying to the extent called for by said summons.

IT IS FURTHER ORDERED that said respondent and any other interested person shall file a written response to said petition within ten (10) days after service of said petition and attached exhibits.

That a copy of this order together with the petition, the affidavits, and the exhibit attached thereto be served upon Joseph J. Mercurio.

DATED at Tampa, Florida, this 29 day of November, 1968.

/s/ Ben Krentzman
UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

MOTION TO INTERVENE AS RESPONDENT

Filed Dec. 9, 1968

[Caption Omitted in Printing]

NOW COMES the Intervenor, Kevin L. Donaldson, and respectfully moves this Court pursuant to Rule 24(a) (2), Federal Rules of Civil Procedure, for leave to intervene as a respondent in this action in order to assert the defenses set forth in his proposed Answer, a copy of which is attached hereto.

The grounds upon which the Intervenor relies in support of his request are:

1. This action is one to judicially enforce an Internal Revenue summons issued by individual Petitioner, John P. Grady, Special Agent, attached and incorporated as Exhibit B in the Petition. This summons seeks to compel Respondent's testimony and the production of records by him purportedly relating to the tax liability or the collection of the tax liability of Kevin L. Donaldson, the Intervenor.

2. Kevin L. Donaldson, the Intervenor, has an interest relating to the transactions which are the subject of this action and is so situated that the disposition of this action may, as a practical matter, impair or impede his ability to protect that interest unless the Intervenor's interest is adequately represented by existing parties, in that a judgment of this Court may adversely and prejudicially effect the substantial rights and privileges se-

cured to him by the Constitution of the United States, as will more definitely appear from the Intervenor's proposed Answer, a copy of which is attached hereto.

3. The tax liability, if any, which is purportedly under investigation by the individual Petitioner and Bruce B. Miller, Special Agent, New Orleans, Louisiana and the taxes if any, which hereafter may be alleged to be due to the United States, will be taxes imposed upon Kevin L. Donaldson, the Intervenor.

WHEREFORE, Kevin L. Donaldson, the proposed Intervenor, respectfully requests an Order of the Court directing that he be permitted to intervene in the above entitled matter and that he be given notice of all subsequent proceedings in this matter and be furnished with copies of all subsequent pleadings through the offices of his attorneys, Louis L. Meldman - Robert E. Meldman, whose post office address is 811 East Wisconsin Avenue, Milwaukee, Wisconsin 53202 and Edward H. Heller, whose post office address is Suite 615, Marine Bank Building, Tampa, Florida.

Dated at Milwaukee, Wisconsin this 6th day of December, 1968.

LAW OFFICES
LOUIS L. MELDMAN
ROBERT E. MELDMAN
811 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

By /s/ Robert E. Meldman
Robert E. Meldman
Attorneys for Intervenor

Local Counsel:
Edward H. Heller
Suite 615, Marine Bank Building
Tampa, Florida

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

ANSWER

[Caption Omitted in Printing]

Filed Dec. 9, 1968

Kevin L. Donaldson, Intervenor, in response to the Petition filed in the above entitled case, respectfully answers and states as follows:

I.

Denies the allegations contained in Paragraph I of the Petition.

II.

Admits the allegations contained in Paragraph II of the Petition.

III.

Admits the allegations contained in Paragraph III of the Petition.

IV.

Denies the allegations contained in Paragraph IV of the Petition.

V.

Admits the allegations contained in Paragraph V of the Petition.

VI.

Admits the allegations contained in Paragraph VI of the Petition.

VII.

Admits the allegations contained in Paragraph VII of the Petition.

VIII.

Denies generally and specifically each and every allegation contained in the Petition not heretofore expressly admitted, qualified or denied.

FURTHER ANSWERING the Petition and as a defense to the allegation that the individual Petitioner and Bruce B. Miller, Special Agent, New Orleans, Louisiana, have been conducting an investigation to determine the income tax liability of Kevin L. Donaldson for the calendar years 1964, 1965, 1966 and 1967, the Intervenor alleges affirmatively as follows:

IX.

Petitioner, John P. Grady, Special Agent and Bruce B. Miller, Special Agent, New Orleans, Louisiana, are guilty of bad faith both with the Court and the Intervenor in asserting that they have been conducting an investigation to ascertain the correct income tax liability of Kevin L. Donaldson for the calendar years 1964, 1965, 1966 and 1967.

X.

John P. Grady is a Special Agent assigned to the Intelligence Division, Internal Revenue Service, Tampa, Florida and Bruce B. Miller is a Special Agent assigned to the Intelligence Division, Internal Revenue Service, New Orleans, Louisiana.

XI.

The function of the Intelligence Division is to enforce the criminal statutes applicable to tax laws by developing information concerning alleged criminal violations thereof.

XII.

Special Agent Bruce B. Miller was assigned the investigation of Kevin L. Donaldson for the calendar years 1964, 1965, 1966 and 1967 for the express and sole purpose of obtaining evidence concerning any violations of the criminal statutes applicable to the tax laws of the United States and Special Agent John P. Grady is assisting Special Agent Miller in this investigation.

XIII.

An administrative summons may be issued under and pursuant to the provisions of Title 26, United States Code, Section 7602 for the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any Internal Revenue tax, or the liability at law or in equity of any transferee or fiduciary of any person in respect of any Internal Revenue tax, or collecting any such liability.

XIV.

As a result of the facts alleged in Paragraphs IX through XIII, inclusive above, the administrative summons issued by the Petitioner, John P. Grady, Special Agent, to Respondent, Joseph J. Mercurio, was not issued for any of the purposes enumerated in Title 26, United States Code, Section 7602 and no proceedings may be brought under the authority of Title 26, United States Code, Section 7402(b) and/or Section 7602(a) to judicially enforce such Internal Revenue summons.

FURTHER ANSWERING the Petition and as a defense to the allegation that testimony concerning, and production for examination of, various books, records and papers in the possession of the Respondent, Joseph J.

Mercurio, relate to the tax liability of Kevin L. Donaldson for the calendar years 1964, 1965, 1966 and 1967, the Intervenor alleges affirmatively as follows:

XV.

The request made by the administrative summons served upon the Respondent was overly broad, sweeping and indefinite, without a showing of particularized relevancy or bearing upon the determination of the correct tax liability of Kevin L. Donaldson.

XVI.

Special Agents John P. Grady and Bruce B. Miller were without personal knowledge of the existence of any or* all of the testimony and/or records required by the administrative summons.

XVII.

Records and testimony required by an administrative summons issued under and pursuant to the provisions of Title 26, United States Code, Section 7602, must be particularly described and be relevant to or bear upon the income tax liability of the taxpayer.

XVIII.

As a result of the facts alleged in Paragraphs XV through XVII, inclusive above, the administrative summons issued by individual Petitioner John P. Grady, Special Agent, to Respondent Joseph J. Mercurio, does not come within the limited scope of Title 26, United States Code, Section 7602, as defined in the well-settled judicial decisions of the Courts of the United States and no proceedings may be brought to enforce such summons.

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*Corrected per Amendment of Answer filed December 13, 1968.

FURTHER ANSWERING the Petition and as a defense to the allegations that it is necessary to examine all of the books, papers and records demanded in the summons attached to the Petition as Exhibit B and to take the testimony of the Respondent in order to ascertain the correct income tax liability of Kevin L. Donaldson for the years 1964, 1965, 1966 and 1967, the Intervenor alleges affirmatively as follows:

XIX.

Kevin L. Donaldson, the Intervenor, the subject of a criminal investigation, accorded all of the rights, privileges and guarantees by the Constitution of the United States, is entitled to be secure in his personal papers and personal effects from unreasonable searches and seizures and cannot be required to give testimony which might tend to incriminate him of violation of any criminal law of the State of Louisiana or the United States of America.

XX.

As a result of the facts alleged in Paragraph XIX above, and in consideration of the fact that Intervenor, Kevin L. Donaldson, filed his Petition and Motion for Restraining Order, which Order was granted by the United States District Court, Middle District of Florida, Tampa Division,* restraining Respondent and all of his attorneys, agents, employees and officers from complying with the oral request of John P. Grady, Special Agent, Internal Revenue Service, for certain books, records and papers relating to Intervenor's tax liability or with the summons issued directing the Respondent to appear and give testimony and produce the books, records and papers relating to Intervenor's tax liability, as objections to John P. Grady, Special Agent, in his capacity as Hearing Of-

*As corrected.

ficer, objecting to the enforcement of the oral request and the administrative summons on the grounds that the use of the information sought by the oral request and summons would violate Intervenor's Constitutional rights and privileges, the administrative summons may not be judicially enforced.

WHEREFORE, the Intervenor respectfully prays:

1. That the Court enter an Order dismissing the Petition herein.

2. That the Court permanently enjoin and restrain the Respondent from complying with each and every requirement of the administrative summons, the subject of this action, or any other summons which may be issued or served subsequently directing the Respondent to appear and give testimony and/or produce the same or similar books, records or papers.

3. That the Intervenor recover his costs in this action.

4. That the Court render such other and further relief as is just and proper.

LAW OFFICES
LOUIS L. MELDMAN
ROBERT E. MELDMAN
811 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

By /s/ Robert E. Meldman
Robert E. Meldman
Attorneys for Intervenor

Local Counsel:
Edward H. Heller
Suite 615, Marine Bank Building
Tampa, Florida

[Affidavit of Mailing Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

RESPONSE TO PETITION
Filed Dec. 9, 1968

[Caption Omitted in Printing]

JOSEPH J. MERCURIO, by and through his attorneys, for written response to the Petitioners' petition to enforce Internal Revenue Service summons says that:

1. He admits the allegations contained in Paragraph I of said petition.

2. He admits the allegations contained in Paragraph II of said petition.

3. He admits the allegations contained in Paragraph III of said petition.

4. He is without knowledge as to the allegations contained in Paragraph IV of said petition except as disclosed by the exhibits to said petition.

5. He admits the allegations contained in Paragraph V of said petition.

6. He admits the allegations contained in Paragraph VI of said petition.

7. He admits the allegations contained in Paragraph VII of said petition.

8. For further response, the Respondent would show the Court that were it not for the said Preliminary Injunction entered on September 13, 1968 in Civil Action No. 67-373 Civ. T, the Respondent would have com-

plied with the summons attached to said petition as Exhibit B to the best of his ability. A copy of a certified copy of said Preliminary Injunction is attached hereto as Exhibit A.

/s/ MONTE K. MARSHALL
of Williams, Parker, Harrison, Dietz & Getzen, Attorneys for Respondent
P. O. Box 3258
1538 State Street
Sarasota, Florida

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

MERTON H. SWEET, a/k/a KEVIN L. DONALDSON, *Petitioner and Movant,*

vs.

JOSEPH J. MERCURIO, Accountant for Acme Circus Operating Company, Inc., d/b/a Clyde Beatty-Cole Bros. Circus, *Respondent.*

No. 68-373—Civ. T.

EXHIBIT A

PRELIMINARY INJUNCTION

Filed Sept. 13, 1968

This matter came on for consideration upon the pending expiration of the Court's Order to Show Cause and Temporary Restraining Order entered in this cause on the 3rd day of September, 1968. The Court has considered the various documents filed in this cause and is further advised by counsel for those involved. The following specifics shall be and are the Court's findings:

1. This matter was presented to the Court upon the verified petition and affidavit of Merton H. Sweet, a/k/a [sic] Kelvin L. Donaldson and the affidavit of petitioner's attorney reciting that all reasonable efforts had been undertaken to notify the respondent and his attorney of petitioner's application for a temporary restraining order.

2. The petitioner clearly demonstrated that immediate and irreparable injury, damage, or loss would result to him before the respondent or his

attorney could be heard in opposition. These facts alleged are as follows:

(a) Respondent, Joseph J. Mercurio, would comply with the requests made by John Grady, Special Agent for the Internal Revenue Service, for examination of certain books and records relating to transactions with petitioner between and during the years 1964 and through 1967.

(b) The information sought is in violation of petitioner's rights under the United States Constitution.

(c) Respondent could not adequately represent petitioner's interest in asserting petitioner's Constitutional rights and privileges.

(d) Petitioner may be bound subsequently by the acts of the respondent.

(e) The information sought relates to a criminal investigation of the income tax liabilities of petitioner and may be used against him in a criminal prosecution relating to the Revenue Laws.

(f) The materials sought are not material or relevant to a lawful subject of inquiry and cannot be investigated under authority of statutes of the United States; and,

(g) Security for payment of costs and damages has been given in an amount deemed proper by the Court.

3. The Court's Order to Show Cause and Temporary Restraining Order was entered at 3:30 p.m. on the 3rd day of September, 1968. Said order afforded respondent

opportunity to be heard and to SHOW CAUSE WHY a restraining order should not be issued to restrain him from complying with requests made by the Internal Revenue Service. The hearing was set for 1:30 p.m., September 11, 1968.

4. Respondent was personally served with a copy of the order on the 5th day of September, 1968.

5. On September 10, 1968, respondent, through his attorney, Monte K. Marshall filed a Response and Request for Damages directed against the petitioner.

6. On the same day the Court received correspondence by letter from petitioner's attorney in Tampa, Edward H. Heller, indicating that the above Response and Request for Damages would be withdrawn.

7. On the 11th day of September, 1968 a withdrawal of response and request for damages was filed with the Court by Mr. Marshall, one of respondent's attorneys.

8. On this day also a stipulation was filed with the Court reciting that respondent had no objection to the temporary restraining order being entered against him. The stipulation further recited that respondent would not comply with the requests of the Special Agent of the Internal Revenue Service until such time as ordered by a court of competent jurisdiction. The stipulation was signed on behalf of respondent by one of his attorneys, Fred J. Mancinik.

It appears to the court that respondent would cause immediate and irreparable injury, loss or damage to the petitioner if he presently complies with the requests made by the Internal Revenue Service; compliance appears to threaten a violation of petitioner's Constitutional rights.

IT IS, THEREFORE, ORDERED AND ADJUDGED:

That the respondent and all of his attorneys, agents, employees and officers past and present be temporarily enjoined and restrained from complying with the request by John Grady, Special Agent for the Internal Revenue Service, for the certain books, records and papers sought relating to the petitioner's tax liability or with any summons which may be issued subsequently directing the respondent to appear and give testimony and/or produce the same or similar books, records and papers relating to petitioner's tax liability, until such time as an order of a court of competent jurisdiction has been issued requiring such compliance.

DONE and ORDERED at Tampa, Florida, this 13th day of September, 1968.

BEN KRENTZMAN
BEN KRENTZMAN
UNITED STATES DISTRICT JUDGE

I certify the foregoing to be a true and correct copy of the original.

Wesley R. Thies, Clerk
United States District Court
Middle District of Florida

By: /s/ Robert H. Cook
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

OPPOSITION TO MOTION TO INTERVENE

Filed Jan. 10, 1969

[Caption Omitted in Printing]

Comes now the United States of America, by and through its attorney, Edward F. Boardman, United States Attorney for the Middle District of Florida, and moves this Court to deny Kevin L. Donaldson, a/k/a Merton H. Sweet's Motion to Intervene and as grounds therefor would respectfully show the Court as follows:

I

That movant herein, Kevin L. Donaldson, a/k/a Merton H. Sweet, has no legal, equitable, possessory, or other interest in the records subject of this summons enforcement proceeding.

II

That said movant has no standing to object to the enforcement of the subject summons and, accordingly, his intervention would afford him no relief.

III

That the movant will not be bound by any judgment rendered herein.

IV

That said movant seeks through intervention to raise issues which are unnecessary, improper and inappropri-

ate for hearing in this cause, all such issues being properly raised in another cause at another time.

V

That movant's intervention would unduly delay and encumber the expeditious adjudication of the rights of the original parties.

Respectfully submitted,

EDWARD F. BOARDMAN
United States Attorney

By: /s/ Thomas G. Wilson
THOMAS G. WILSON
Assistant United States Attorney

/s/ E. Grady Jolly, Jr.
E. GRADY JOLLY, JR.
Trial Attorney
Department of Justice
Washington, D. C.

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

UNITED STATES OF AMERICA and
JOHN P. GRADY, *Petitioners*

vs.

JOSEPH J. MERCURIO, *Respondent,*

KEVIN L. DONALDSON, f/k/a MERTON H. SWEET, *Applicant for Intervention*

Civ. T.
No. 68-490

ORDER

Filed Jan. 16, 1969

THIS CAUSE came on for consideration upon the filing by the Applicant for Intervention, Kevin L. Donaldson, of a Motion to Intervene as Respondent.

The Court has considered the motion and memoranda filed in the cause, heard argument of counsel, and is otherwise fully advised in the premises.

It is therefore, upon consideration,

ORDERED and DECREED:

That the Motion to Intervene be, and the same is hereby, DENIED.

DONE and ORDERED at Tampa, Florida, this 16th day of January, 1969.

/s/ Joseph P. Lieb
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

UNITED STATES OF AMERICA and JOHN P. GRADY, *Petitioners,*

v.

JOSEPH J. MERCURIO, *Respondent.*

No. 68-490—Civ. T.

ORDER

Filed Jan. 16, 1969

The above-entitled and numbered cause, having come before this Court for hearing on this Court's Order to Show Cause directing that the respondent, Joseph J. Mercurio, appear to show cause why he should not be compelled to produce records and testify as demanded in the Internal Revenue Service summons served on him September 12, 1968, by the petitioner, John P. Grady, and after having considered the pleadings filed herein, the testimony of witnesses, and the argument of counsel, it is

ORDERED, ADJUDGED, AND DECREED that Joseph J. Mercurio, appear before Special Agent John P. Grady at a place mutually agreeable between petitioner and Joseph J. Mercurio on January 31, 1969, at 10 a.m. to testify and produce for examination and copying the following described records in his possession of Acme Circus Operating Company, Inc., d/b/a Clyde Beatty-Cole Bros. Circus, that relate to Merton H. Sweet, a/k/a Kevin L. Donaldson:

1. Copies of any applications for employment and/or any other records containing background data

including Social Security number furnished you by Merton H. Sweet, a/k/a Kevin L. Donaldson.

2. Copies of any and all contracts between Merton H. Sweet, a/k/a Kevin L. Donaldson, and the Acme Circus Operating Company, Inc., and between Merton H. Sweet, a/k/a Kevin L. Donaldson, and the various organizations sponsoring performances of the circus in their respective cities during the years 1964 through 1967, inclusive.

3. Copies of all Forms 1099 and Forms W-2 issued to Merton H. Sweet, a/k/a Kevin L. Donaldson, during the years 1958 through 1967, inclusive.

4. A transcript or schedule setting forth the date, amount and purpose of each payment made to Merton H. Sweet, a/k/a Kevin L. Donaldson, by the organizations sponsoring performances of the circus during the years 1964 through 1967, inclusive.

5. Copies of all cancelled checks, cash vouchers or other records relating to payments to Merton H. Sweet, a/k/a Kevin L. Donaldson, for any purpose by Acme Circus Operating Company, Inc., during the years 1964 through 1967, inclusive.

6. Transcript or schedule or other records containing or relating to the purpose of each cancelled check issued by Acme Circus Operating Company, Inc. to Merton H. Sweet, a/k/a Kevin L. Donaldson, for any purpose for the years 1964 through 1967, inclusive.

7. Copies of all expense vouchers submitted by Merton H. Sweet, a/k/a Kevin L. Donaldson, during the years 1964 through 1967, inclusive.

8. Copies of any records containing information relating to the identification of each sponsoring organization and city where Merton H. Sweet, a/k/a Kevin L. Donaldson, promoted the Clyde

Beatty-Cole Bros. Circus during the years 1964 through 1967, inclusive.

9. Copies of correspondence or other records relating to the foregoing or to any other financial transactions between Acme Circus Operating Company, Inc. and Merton H. Sweet, a/k/a Kevin L. Donaldson, during the years 1964 through 1967, inclusive.

SO ORDERED this 16th day of January, 1969 at Tampa, Florida.

/s/ Joseph P. Lieb
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

MOTION TO STAY EFFECTIVE DATE PENDING APPEAL

Filed Jan. 16, 1969

[Caption Omitted in Printing]

NOW COMES the Intervenor, Kevin L. Donaldson, and respectfully moves this Court pursuant to Rule 8(a)(b) Federal Rules of Appellate Procedure, to stay the effective date of its Order in this action pending the disposition of Intervenor's appeal to the United States Court of Appeals for the Fifth Circuit and for that purpose to fix the amount of the bond or security required to be filed by Intervenor.

Louis L. Meldman
Robert E. Meldman
Attorneys at Law
811 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

By /s/ Robert E. Meldman
Robert E. Meldman
Attorney for Intervenor

Local Counsel:
Edward H. Heller
Attorney at Law
615 Marine Bank Building
Tampa, Florida

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

ORDER GRANTING STAY OF EFFECTIVE DATE PENDING APPEAL

Filed Jan. 16, 1969

[Caption Omitted in Printing]

This cause came on to be heard on motion of Intervenor for a stay pending Intervenor's appeal to the United States Court of Appeals for the Fifth Circuit, and it appearing to the Court that Intervenor is entitled to such a stay, it is

ORDERED that the effective date of the Order rendered herein on January 16, 1969, be stayed pending the determination of Intervenor's appeal from such Order, provided that Intervenor file and have approved by this Court on or before January 17, 1969, a personal bond on appeal secured by cash deposit in the sum of $250.00 conditioned in accordance with Rule 8 of the Federal Rules of Appellate Procedure.

Dated this 16th day of January, 1969.

/s/ Joseph P. Lieb
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

NOTICE OF APPEAL

Filed Jan. 16, 1969

[Caption Omitted in Printing]

Notice is hereby given that Kevin L. Donaldson, f/k/a Merton H. Sweet, applicant for intervention above named, by his attorney, Robert E. Meldman, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order denying applicant's motion to intervene as a respondent in order to assert his defenses to enforcement of an Internal Revenue summons, entered in this action on January 16th, 1969.

Louis L. Meldman
Robert E. Meldman
Attorneys at Law
811 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

By /s/ Robert E. Meldman
Robert E. Meldman
Attorney for Applicant for
Intervention

Local Counsel:
Edward H. Heller
Attorney at Law
615 Marine Bank Building
Tampa, Florida

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

MOTION TO CONSOLIDATE
Filed Jan. 17, 1969

[Caption Omitted in Printing]

Comes now the United States of America, by and through its undersigned attorneys, Appellee herein, and moves this Court to consolidate for purposes of appeal the two-captioned cases, and as grounds therefore, would show the Court that the orders appealed from in each of the captioned cases are identical, and the issues on appeal are identical in all respects, and would further show the Court that this motion is made with the consent of the Appellant herein.

EDWARD F. BOARDMAN
United States Attorney

By /s/ Thomas G. Wilson
THOMAS G. WILSON
Assistant United States Attorney

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

ORDER
Filed Jan. 20, 1969

[Caption Omitted in Printing]

This cause having come before the Court this day on Motion of the United States of America to Consolidate the captioned cases for purposes of appeal, and it appearing that the parties to the appeal are in agreement, that same should be consolidated, and it further appearing to this Court that good cause has been shown why these cases should be consolidated for purposes of appeal, it is, upon consideration,

ORDERED, ADJUDGED and DECREED that the captioned cases are hereby consolidated for purposes of appeal.

DONE and ORDERED, at Tampa, Florida, this 20th day of January, 1969.

/s/ Joseph P. Lieb
UNITED STATES DISTRICT JUDGE

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 27341

UNITED STATES OF AMERICA and
JOHN P. GRADY, *Petitioners-Appellees,*

versus

JOSEPH J. MERCURIO and ACME CIRCUS
OPERATING COMPANY, INC., *Respondents,*

versus

KEVIN L. DONALDSON, f/k/a
MERTON H. SWEET, *Intervenor-Appellant.*

Appeals from the United States District Court for the Middle District of Florida

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(October 30, 1969)

Before TUTTLE, WISDOM and BELL, Circuit Judges.

TUTTLE, Circuit Judge: We have here for consideration against phase of the problem arising when a United States District Court is asked by an Internal Revenue special agent to enforce a subpoena requiring the production of records affecting a taxpayer.

The enforcement procedures were commenced under the authorization of Title 26, U.S.C.A., §§7602 and 7604.[1]

The issue was raised in the following manner: (There are actually two cases involved here). On November 25, 1968, petitioners, United States of America and John P. Grady filed a petition to enforce Internal Revenue Service summons against respondent, Joseph J. Mercurio, and against Acme Circus Operating Company, Inc., two former employers of the taxpayer, Kevin L. Donaldson, formerly known as Merton H. Sweet, the taxpayer and the appellant here. Following the issuing by the trial court of its order to show cause, on December 9, 1968, intervenor Donaldson filed his motion to intervene as a respondent and to file an answer. On December 13, respondents filed their answers in which they stated that they were prepared to answer the subpoenas but for the granting of a temporary restraining order which had

[1]"§7602. Examination of books and witnesses.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized —

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

Section 7604 confers jurisdiction on the district court to require a response upon proper showing of such subpoena.

previously been issued by the trial court "until such time as an order of a court of competent jurisdiction has been issued requiring such compliance." On January 10, 1969, petitioners, United States of America and Grady, filed their opposition to the motion to intervene. On that date, a hearing was had on Donaldson's motion to intervene as respondent. Memoranda of law were filed in support of and in opposition to the motion and the matter was continued until January 16, 1969. On that date the court entered its order denying Donaldson's motion to intervene, and entered its order directing respondent's to comply with the Internal Revenue summons. This order was later stayed pending appeal. Notice of appeal was filed on the same day and the matter is here now for our consideration.

It may clarify the discussion here to begin by stating what is *not* involved. We do *not* have a case in which a subpoena has been issued at the instance of a special agent of the Internal Revenue Service against a *taxpayer* himself, seeking access to *his* records and papers and the right to take his testimony, such as was the case in *United States v. Cohen,* 9 Cir., 1967, 388 F. 2d 464; nor is it a case in which the subpoena seeks to obtain records *of the taxpayer* in the hands of his attorney or accountant, which the courts have deemed the same as if they were in the possession of the taxpayer himself. See *Reisman v. Caplin,* 375 U.S. 440, and this court's recent decision in *Stuart v. United States, et al,* 5 Cir., decided September 17, 1969, — F. 2d —; nor is it a case in which records actually belonging to the *taxpayer* are subpoenaed while in possession of some third person, but where no privilege exists.

To the contrary, what we have here is a subpoena served on two former employers of the taxpayer demand-

ing the production of *their* own records, not the records of the *taxpayer.*

It would seem, upon the most casual observance of this situation, that if the United States were seeking to obtain these records in support of an actual prosecution, following indictment, appellant would have no basis for seeking to have the indictment quashed on the ground of a violation either of Fourth or Fifth Amendment rights, since there would have been no unreasonable search or seizure nor any compulsion of the taxpayer's giving evidence against himself. The issue that is here presented, therefore, depends solely upon the appellant's argument that the court's power to require a response to the subpoena must depend upon the validity of the original subpoena itself; that the Internal Revenue Code authorization for the issuing of a subpoena is restricted to the obtaining of records and testimony where no criminal prosecution is in prospect or in contemplation. By alleging, in its petition to intervene, that the subpoena was not truly issued for one of the purposes authorized under Section 7602, appellant claims he was entitled to intervene to raise this issue, since the employers were not concerned about protecting any rights of appellant.

To sustain his right to intervene, the appellant, in his brief, cites Rule 24(a) of the Federal Rules of Civil Procedure.[2] However, oral argument, appellant relied for his right to intervene solely on *Reisman v. Caplin,*

[2] "(Rule 24(a): Intervention: (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

supra. He claims that he should be given the relief of intervention as a matter of right. In order to test this question, since the trial court did not conduct an evidentiary hearing, we must look to the pleading by which appellant sought to intervene. Once again, it is necessary to point out what the petition does *not* contend: (1) It does not contend that the papers sought to be obtained from the former employer were *his* papers; (2) he does not contend any confidential relationship which under the rules of privilege would entitle him to prevent a disclosure by his former employer of any facts that might be relevant to the inquiry being made. In effect, the petition alleges that he has an interest in the subject matter of the investigation, which, of course, he has, that is, whether or not there has been a deficiency in the tax returns or tax payments made by the taxpayer and/or whether or not such deficiency is of such a nature as to warrant recommendation of prosecution for a crime against the revenues. However, it does *not* allege any fact which, if found in his favor, would warrant the trial court's quashing the subpoena against the third party.

The petition of the United States and John P. Grady was supported by an affidavit by special agents Miller and Grady as follows:

> "In his capacity as special agent, he is assisting in the conduct of an investigation for the purpose of ascertaining the correct income tax liability of Merton H. Sweet, also known as Kevin L. Donaldson, for the years 1964 through 1967 inclusive."

In his motion to intervene, appellant alleges:

> "Petitioner John P. Grady, special agent, and Bruce B. Miller, special agent, New Orleans, Louisiana, are guilty of bad faith both with the court and

the intervenor in asserting that they have been conducting an investigation to ascertain the correct income tax liability of Kevin L. Donaldson, for the calendar years 1964, 1965, 1966 and 1967.

"John P. Grady is a special agent assigned to the intelligence division, Internal Revenue Service, Tampa Florida, and Bruce B. Miller is a special agent assigned to the Intelligence Division, Internal Revenue Service, New Orleans, Louisiana.

"The function of the Intelligence Division is to enforce the criminal statutes applicable to tax laws by developing information concerning alleged criminal violations thereof.

"Special Agent Bruce B. Miller was assigned the investigation of Kevin L. Donaldson for the calendar years 1964, 1965, 1966 and 1967 for the express and sole purpose of obtaining evidence concerning any violations of the criminal statutes applicable to the tax laws of the United States and special agent John P. Grady is assisting special agent Miller in this investigation."

These, then, are the allegations of the complaint upon which the appellant bases his contention that the issuance of a subpoena in support of such an investigation is beyond the authority contained in Section 7604. In making this contention, appellant relies heavily upon language of the Supreme Court in *Reisman v. Caplin,* supra. The particular language relied upon is as follows:

"Furthermore, we hold that in any of these procedures before either the district judge or United States Commissioner, the witness may challenge the summons on any appropriate ground. This would

include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, Boren v. Tucker, 9 Cir., 239 F. 2d 767, 772-773, as well as that it is protected by the attorney-client privilege, Sail v. U. S., 8 Cir., 228 F. 2d 682. In addition, third parties might intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, may intervene. See in Re: Albert Lindley Lee Memorial Hospital, supra, and Corbin Deposit Bank of Corbin, Ky. v. U. S. supra. . . ."

Appellant contends that since the function of the special agents is to investigate to see whether a crime has been committed, no subpoena can be issued under the authority of Section 7602 because of the language of the Reisman opinion *"this would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution,"* citing *Boren v. Tucker,* supra.

This argument goes too far. In the first place, it will be noted that under the express language of the Act, the subpoena may be served upon the taxpayer himself or upon any other person having records relevant to the inquiry. It is also apparent that *there is no express limitation on the face of the statute* that the power to make the investigation to — ascertain "the correctness of any return, making a return where none has been made, determining the liability for any person for any internal revenue tax" limits the inquiry to such as will result *solely* in a proposed deficiency in tax or deficiency plus civil fraud penalties. Nor is there any limitation expressed on the face of the act that the inquiry may not be made if

"determining the liability of any person for any internal revenue tax" or "ascertaining the correctness of [a] return" is made to assist the internal revenue service agents in determining *whether there is sufficient evidence that a crime against the revenues has been committed to warrant a recommendation* to the Justice Department that the case be marked for prosecution.

The investigation made by a special agent of the Internal Revenue Service, of which by this time the courts may take judicial notice, see footnote 3 in *Wild v. United States,* 9 Cir., 362 F. 2d 206, at page 208,[3] includes the duty of "developing information concerning alleged criminal violations, evaluating allegations and indications of such violations to determining investigations to be undertaken, investigating suspected criminal violations of such laws, recommending prosecution when warranted, and measuring effectiveness of the investigation and prosecution processes." Most significant, it seems to us, is the citation by the Supreme Court in *Reisman* as the basis for its statements relative to criminal prosecutions, of the case of *Boren v. Tucker,* 9 Cir., 239 F. 2d 767. In the

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[3]This footnote is as follows:

"30 Fed. Reg. 9399-9400 (July 28, 1965), 1966 CCH Stand. Fed. Tax Rep. §5988, which provides:

"1118.6 INTELLIGENCE DIVISION.

"The Intelligence Division enforces the criminal statutes applicable to income, estate, gift, employment, and excise tax laws (except those relating to alcohol, tobacco, narcotics, and certain firearms), by developing information concerning alleged criminal violations thereof, evaluating allegations and indications of such violations to determine investigations to be undertaken, investigating suspected criminal violations of such laws, recommending prosecution when warranted, and measuring effectiveness of the investigation and prosecution processes. The Division assists other Intelligence offices in special inquiries, drives and compliance programs and in the normal enforcement programs, including those combating organized wagering, racketeering and other illegal activity, by providing investigative resources upon regional or National Office request. It also assists U. S. Attorneys and Regional Counsel in the processing of Intelligence cases, including the preparation for and trial of cases."

Boren case, the Ninth Circuit enforced the subpoena. In doing so, it distinguished the case of *United States v. O'Connor,* D.C. Mass., 1953, 118 F. Supp. 248. The *Boren* opinion pointed out that in *O'Connor,* an indictment had already been returned against the taxpayer; that there was no other pending investigation; and the special agent was used as a means to cause a subpoena to issue as if the case were still in the investigatory stage. Pointing out the difference between the *O'Connor* case and that pending before it, the Court of Appeals for the Ninth Circuit, in *Boren,* said:

> "It should be noted that the statute under consideration, by its language, does not limit the examination it authorizes solely to the issue of correctness. Section 7602 authorizes an examination for the purpose of 'ascertaining the correctness,' 'determining the liability of any person for any internal revenue tax,' 'or collecting any such liability.' If a fraudulent tax return changes a taxpayer's liability, how could that fact be established without someone being required to come to a conclusion as to a possible criminal prosecution? Once an error has been established, it seems necessary for the examiner to come to some conclusion, one way or the other, as to whether there existed the possibility of criminal prosecution in the future. If no possibility exists, then one rule to determine liability comes into play — i.e., what tax should have been paid when the tax is correctly determined. If a possible criminal prosecution exists, then there is a possibility of another rule being used, the 50% penalty, to determine the correct tax. While it is true that once a possible criminal prosecution comes into existence there can be no settlement of tax until that possibility has been ruled out, yet the existence of the possibility of criminal prosecution does not necessarily mean

that there will be criminal prosecution. The ultimate decision may be, (1) civil liability for the correct tax, (2) liability for the tax plus penalty, (3) criminal prosecution, or (4) both the penalty and the criminal prosecutuion. Helvering v. Mitchell, supra; 26 U.S. C.A. §6653(b), 7201 et seq.

"In truth, we presume the 'Secretary or his delegate' would be unfaithful to his statutory responsibilities if in every examination, once an incorrect return has been demonstrated or established, he did not come to some preliminary conclusion as to whether there existed facts sufficient upon which to base a possible criminal prosecution, without coming to any conclusion as to whether there should be a criminal prosecution."

This court has recognized the same principle as stated in *Boren* in *Venn v. United State,* 5 Cir., 1968, 400 F. 2d at 210.

As we construe the motion to intervene, it simply says that since the subpoena has been issued by a special agent whose duty it is to aid in developing information relative to a possible prosecution this would amount to an "improper purpose of obtaining evidence for use in a criminal prosecution," within the language of the Supreme Court in *Reisman.*

In view of the fact that there is no allegation in the complaint that even the special agent had recommended a prosecution, much less that the Internal Revenue Service had sent the case to the Department of Justice for the purpose of presentation to a grand jury, the investigation being made by the special agents would still, in our view, come within the authority granted within 7602, as described in the *Boren* opinion. A case which strongly sup-

ports this view is *In Re-Magnus, Mabee, Reynard, Inc.*, 2 Cir., 1962, 311 F. 2d 12.

We think it essential to bear in mind what seems to be so often unspoken in discussion of the power given under 7602 and 7604(b). Before indictment but after a potential criminal investigation commences, the courts have been somewhat troubled by the question of how much interrogation of the *taxpayer* is *constitutionally* permissible. Of course, after indictment, no subpoena can run against the accused.

There is no *constitutional* question as to the power of the Service to question, or subpoena records of *third parties* either before or *after* indictment. In cases in which the courts inveigh against the use of 7602 by a special agent, broad language is sometimes used to limit the authority because this effort has usually been made to obtain evidence from the taxpayer. The language is not apt and, is not controlling, if the subpoena power is being used to compel evidence by *third parties*. We have merely a problem of statutory construction of Section 7602.

There being no right which the appellant asserts that he could present to warrant the trial court's refusal to enforce the subpoena, the right to intervene has not been established. The language in *Reisman* "in addition, third parties might intervene to protect their interest, or in the event the taxpayer is not a party to the summons before the hearing officer, he too may intervene" is, of course, limited to the right to intervene if the person seeking the right can demonstrate to the court that he has interests to protect. Here, Donaldson's petition has alleged no such interest.

The trial court correctly denied the motion to intervene. The judgment is AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 1969

No. 27341

D. C. Docket No. Civ. 68-490 & 68-491-T

UNITED STATES OF AMERICA and
JOHN P. GRADY,

Petitioners-Appellees,

versus

JOSEPH J. MERCURIO and ACME CIRCUS
OPERATING COMPANY, INC.,

Respondents,

versus

KEVIN L. DONALDSON, f/k/a
MERTON H. SWEET,

Intervenor-Appellant.

Appeals from the United States District Court for the Middle District of Florida

Before TUTTLE, WISDOM and BELL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

It is further ordered that intervenor-appellant pay to petitioners-appellees, the costs on appeal to be taxed by the Clerk of this Court.

October 30, 1969

Issued as Mandate:

Supreme Court of the United States

No. 942 ---- , *October Term, 19* 69

Kevin L. Donaldson fka Merton H. Sweet,

Petitioner,

v.

United States et al.

ORDER ALLOWING CERTIORARI. Filed February 27 ---------- , 19 70.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth ---------- Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U.S.
FILED
DEC 11 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. ~~942~~ 65

KEVIN L. DONALDSON,
f/k/a MERTON H. SWEET,

Petitioner,

versus

UNITED STATES OF AMERICA and
JOHN P. GRADY,

Respondents,

versus

JOSEPH J. MERCURIO and ACME CIRCUS
OPERATING COMPANY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No.

KEVIN L. DONALDSON,
f/k/a MERTON H. SWEET,

Petitioner,

versus

UNITED STATES OF AMERICA and
JOHN P. GRADY,

Respondents,

versus

JOSEPH J. MERCURIO and ACME CIRCUS
OPERATING COMPANY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Kevin L. Donaldson, your petitioner, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in the above entitled case entered on October 30, 1969.

OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals, reprinted in Appendix A hereto, is unofficially reported at — F. 2d — (69-2 USTC 9701).

JURISDICTION

The judgment of the Court of Appeals, reprinted in Appendix B hereto, was entered on October 30, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I.

Whether the taxpayer under investigation has a right to intervene in proceedings seeking judicial enforcement of Internal Revenue Summonses issued to third parties.

II.

Whether an intervening taxpayer is entitled to a full adversary hearing in challenging enforcement of administrative Summonses issued by the Internal Revenue Service.

THE STATUTORY PROVISIONS INVOLVED

This case involves an interpretation of Section 7602 and Section 7604(a) of the Internal Revenue Code of 1954, which provisions are set forth in Appendix C hereto.

STATEMENT OF THE CASE

Petitioner, receiving notice that the Internal Revenue Service contemplated issuing Summonses to Joseph J. Mercurio and Acme Circus Operating Company, Inc.,[1] moved for and was granted a Preliminary Injunction

[1]The Court of Appeals designated these parties as "two former employers of the taxpayer." (Appendix A, *infra*, p. 12), a determination which finds no support in the record.

and Temporary Restraining Order.[2] (R. 26, 64).[3] Pursuant to the Preliminary Injunction and Temporary Restraining Order, Mercurio and Acme refrained from complying with the Summonses subsequently issued by the Internal Revenue Service. (R. 14, 52). The underlying actions were instituted by the Government, in the District Court, pursuant to Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954. (R. 4, 42). The Summonses in question required Mercurio and Acme to appear and give testimony concerning the alleged income tax liability of your petitioner for the years 1964 through 1967, inclusive, and to produce for inspection the books and records of Acme Circus Operating Company, Inc., d/b/a Clyde Beatty-Cole Bros. Circus. (R. 9, 47).

On December 6, 1968, your petitioner filed Motions to Intervene and Answers in each of the enforcement proceedings setting forth good faith affirmative defenses. (R. 16, 54). The United States filed a Motion in Opposition to Intervention. (R. 30, 66).

The District Court denied your petitioner's Motions to Intervene and ordered enforcement of the Summonses, upon consideration of the pleadings, Memoranda of the parties, and argument of counsel, but without benefit of any testimony. (R. 32, 33, 68).

The Court of Appeals affirmed the District Court Order. The Fifth Circuit held the right to intervene had not been established, concluding your petitioner alleged

---

[2]The procedure approved by this Court in *Reisman v. Caplin,* 375 U.S. 440, 449, 450 (1964).

[3]"R" references are to the printed Appendix in the United States Court of Appeals.

no interest which warranted the trial Court's refusal to enforce the Summonses. (Appendix A, *infra,* pp. 15, 21). The Opinion seemingly holds that intervention under *Reisman v. Caplin,* 375 U.S. 440 (1964), is limited to factual situations unlike the case at bar, where a taxpayer alleges a legal or equitable claim to the records sought, a proprietary interest, or privileged relationship. (Appendix A, *infra,* p. 13).

A timely Application for Stay of Mandate was filed by your petitioner pending his Petition for Certiorari. On November 18, 1969, the United States Court of Appeals for the Fifth Circuit granted a Stay of Mandate.

REASONS FOR GRANTING THE WRIT

I.

The Decision of the Fifth Circuit is in Direct Conflict With Decisions of the Courts of Appeal for the Seventh Circuit in *United States v. Benford,* 406 F. 2d 1191 (C.A. 7, 1969), for the Third Circuit in *United States v. Bank of Commerce,* 405 F. 2d 931 (C.A. 3, 1969), and for the Sixth Circuit in *Justice v. United States,* 365 F. 2d 312 (C.A. 6, 1966), and is Inconsistent With This Court's Decision in *Reisman v. Caplin,* 375 U.S. 440 (1964).

This Court, in *Reisman v. Caplin,* 375 U.S. 440 (1964), determined the rights of Internal Revenue Service Agents to enforce administrative Summonses issued under Section 7602 of the Internal Revenue Code of 1954, and the concomitant rights of witnesses, third parties, taxpayers, and other parties affected. Prior judicial decisions in various circuits had limited the types of objections that could be asserted by third parties summoned or inter-

vening taxpayers.[4] The *Reisman* decision eliminated these distinctions by expressly providing that:

> both parties summoned and those affected by a disclosure may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims. *Reisman v. Caplin,* 375 U.S. 440, 445 (1964).

The Fifth Circuit would limit intervention under *Reisman* to proceedings seeking production of documents belonging to a taxpayer, the work product of his attorney, or documents in which the taxpayer claimed some proprietary interest, or evidentiary claim of privilege. (Appendix A, *infra,* pp. 13, 21. Concluding that petitioner had not alleged a requisite interest, the Fifth Circuit affirmed the Order of the District Court.

A taxpayer has the right to intervene in a judicial proceeding wherein the Internal Revenue Service seeks to enforce its Summons issued in connection with the taxpayer's alleged tax liability.

The preceding proposition is unequivocally supported by the decisions of the Courts of Appeal for the Third Circuit in *United States v. Bank of Commerce,* 405 F. 2d 931 (C.A. 3, 1969); the Sixth Circuit in *Justice v. United States,* 365 F. 2d 312 (C.A. 6, 1966); and the Seventh Circuit in *United States v. Benford,* 406 F. 2d 1191 (C.A. 7, 1969). In *Benford,* the District Court denied intervention holding that this Court's decisions in *Reisman v. Caplin,* 375 U.S. 440 (1964), and *United States v. Powell,* 379 U.S. 48 (1964), did not alleviate the necessity to show a proprietary or other special in-

---

[4] *Foster v. United States,* 265 F. 2d 183 (C.A. 2, 1959), cert. den. 360 U.S. 912 (1959); *Hubner v. Tucker,* 245 F. 2d 35 (C.A. 9, 1957); *DeMasters v. Arend,* 313 F. 2d 79 (C.A. 9, 1963); *Application of Magnus,* 311 F. 2d 12 (C.A. 2, 1962), cert. den. 375 U.S. 902 (1963).

terest in the records subject of a summons, and that being the taxpayer whose liability is under scrutiny is not alone sufficient a basis for intervention.

The Court of Appeals in *United States v. Benford,* 406 F. 2d 1191, 1193, 1194 (C.A. 7, 1969), responded by stating:

> If the import of *Reisman* and *Powell* were closely confined to their facts, we could well agree with the district court.
>
> * * * * * * *
>
> But the opinions did not qualify the broad statements that "both parties summoned and those affected by a disclosure may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims"; that "In addition, third parties might intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, may intervene"; * * * The opinions did not expressly, and, as we read them, did not impliedly, limit the taxpayer's right to intervene in enforcement proceedings to situations where a legally protected interest in the records could be shown.

United States v. Bank of Commerce, 405 F. 2d 931 (C.A. 3, 1969); and *Justice v. United States,* 365 F. 2d 312 (C.A. 6, 1966), involved the enforcement of summonses issued to banks concerning the taxpayer's transactions. The taxpayers in *Bank of Commerce* and *Justice* had no greater interest in the documents demanded than your petitioner has in the records sought herein. Nevertheless, the Courts allowed intervention by those taxpayers. Cf. *Application of Cole,* 342 F. 2d 5, 7-8 (C.A. 2, 1965), cert. den. 381 U.S. 950 (1964), where the *sole* question presented was whether the Internal Revenue Service, when it issues a summons to a third person under Section 7602, is required to give the taxpayer notice thereof.

Discussing a taxpayer's intervention in summons enforcement proceedings, the Court of Appeals in *Justice v. United States,* 365 F. 2d 312, 314 (C.A. 6, 1966), adopted the guidelines established by this Court in *Reisman* and further commented:

> Upon consideration of the motion of the taxpayers to intervene, the Court finds that these proceedings under Section 7604(b) are properly before the Court. The questions raised as to the Taxpayers' constitutional rights and their rights and privileges under the various revenue statutes must be heard and determined by the District Court under the Federal Rules of Civil Procedure. See Rules 24 and 81(a)(3).
>
> The Court finds it is probable that the representation of the Taxpayers' interest by existing parties may be inadequate and that the Taxpayers may be bound by a judgment in the action. This Court is of the opinion that unless the Taxpayers are permitted to intervene, they would not be aggrieved parties, entitling them to an appeal.

The Court in *United States v. Bank of Commerce,* 405 F. 2d 931, 933 (C.A. 3, 1969), concluded:

> At the outset, we are confronted by the appellee's contention that the appellant lacks standing to raise the objections which he asserts. We do not agree. The rule approved by the Supreme Court in *Reisman v. Caplin,* 375 U.S. 440 (1964), is that a taxpayer may intervene in an enforcement proceeding and challenge enforcement of the summons by raising constitutional or other objections in protection of his rights and interests. Here, *appellant's defenses, as he styles them, are aimed solely at protecting his individual rights and interests. Appellant makes no claim on behalf of the bank, either derivatively or in a representative capacity.* [Emphasis added]

It is submitted that no material distinction exists between the facts in this case and those present in *Benford, Justice,* and *Bank of Commerce.* (R. 22, 27, 60). Accordingly, the Fifth Circuit's decision is in conflict with the decisions of the aforestated Courts of Appeal, and this Court's mandate in *Reisman v. Caplin,* 375 U.S. 440 (1964), and unless reversed stands to cause an anomalous result.

II.

The Decision of the Fifth Circuit so Far Departs from the Judicial Procedure Established by This Court in *Reisman v. Caplin,* 375 U.S. 440 (1964), and *United States v. Powell,* 379 U.S. 48 (1964), as to Call for an Exercise of This Court's Power of Supervision.

United States v. Powell, 379 U.S. 48 (1964), which also involved the enforcement of Internal Revenue Summonses brought by the Government pursuant to Section 7604(b) of the Internal Revenue Code of 1954, established standards the Commissioner of Internal Revenue must meet to obtain judicial enforcement of administrative Summonses:

> He must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed — * * * This does not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered. At the hearing, he "may challenge the summons on any appropriate grounds," *Reisman v. Caplin,* 375 U.S. 440, at 449, 84 S. Ct. at 513. Nor does our reading of the statutes mean that under no

> circumstances may the court inquire into the underlying reasons for the examination. It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused.
>
> *United States v. Powell,* 379 U.S. 48, 58 (1964).

The Fifth Circuit in not allowing intervention denied petitioner an adversary hearing, a right it subsequently recognized in *United States v. Roundtree,* — F. 2d — (C.A. 5, Nov. 20, 1969), 69-2 USTC 9733:

> A proceeding to enforce a summons is an adversary proceeding. *Reisman v. Caplin,* 1964, [64-1 USTC ¶ 9202] 375 U.S. 440, 446, 84 S. Ct. 508, 11 L. Ed. 2d 459; *Dunn v. Ross,* 5 Cir. 1966, [66-1 USTC ¶ 9238] 356 F. 2d 664, 667. In the absence of other statutory directions, the Federal Rules of Civil Procedure apply. Fed. R. Civ. P. 81(a)(3); *Powell,* 379 U.S. at 58 n. 18; *United States v. McKay,* 5 Cir. 1967, [67-1 USTC ¶ 12,449] 372 F. 2d 174. We have construed the thrust of this determination to be that "the parties must be given a full opportunity in an adversary hearing to present their case". *Venn,* 400 F. 2d 212 n. 12.
>
> *United States v. Roundtree,* at page, 86,068.

The District Court below has taken no testimony and has not permitted petitioner to submit evidence nor cross-examine Government witnesses in an effort to attack its pleadings and affidavits. Under these circumstances, petitioner has not been afforded the adversary proceeding prescribed by this Court in *Reisman* and *Powell,* nor by the Fifth Circuit:

> . . . [I]t hardly comports with good administration, if not due process, to determine the merits of a claim asserted in a pleading seeking an adjudication through an adversary hearing by denying access to the court at all. *Atlantis Development Corporation v. United States,* 379 F. 2d 818, 827 (C.A. 5, 1967).

The parties against whom the United States have commenced the underlying actions were restrained from complying with the subject summonses until such time as an order of a court of competent jurisdiction was issued requiring such compliance. (R. 27, 64). The full judicial review inherent in such order contemplates a hearing which will exhaust all issues submitted to the court or which are properly the subject of submission to the court. This necessitates the involvement of all real parties in interest which will thereafter be governed by a determination. A premature determination of the merits, sanction by the Fifth Circuit, so far departs from recognized judicial procedures, as to require the exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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December 9, 1969.

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27341

UNITED STATES OF AMERICA and
JOHN P. GRADY,

Petitioners-Appellees,

versus

JOSEPH J. MERCURIO and ACME
CIRCUS OPERATING COMPANY, INC.,

Respondents,

versus

KEVIN L. DONALDSON, f/k/a
MERTON H. SWEET,

Intervenor-Appellant.

Appeals from the United States District Court for the Middle District of Florida

(October 30, 1969)

Before TUTTLE, WISDOM and BELL, Circuit Judges.

TUTTLE, Circuit Judge: We have here for consideration against phase of the problem arising when a United States District Court is asked by an Internal Revenue special agent to enforce a subpoena requiring the production of records affecting a taxpayer.

The enforcement procedures were commenced under the authorization of Title 26, U.S.C.A., §§7602 and 7604.[1]

The issue was raised in the following manner: (There are actually two cases involved here). On November 25, 1968, petitioners, United States of America and John P. Grady filed a petition to enforce Internal Revenue Service summons against respondent, Joseph J. Mercurio, and against Acme Circus Operating Company, Inc., two former employers of the taxpayer, Kevin L. Donaldson, formerly known as Merton H. Sweet, the taxpayer and the appellant here. Following the issuing by the trial court of its order to show cause, on December 9, 1968, intervenor Donaldson filed his motion to intervene as a respondent and to file an answer. On December 13, respondents filed their answers in which they stated that

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[1]"§7602. Examination of books and witnesses.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized —

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

Section 7604 confers jurisdiction on the district court to require a response upon proper showing of such subpoena.

they were prepared to answer the subpoenas but for the granting of a temporary restraining order which had previously been issued by the trial court "until such time as an order of a court of competent jurisdiction has been issued requiring such compliance." On January 10, 1969, petitioners, United States of America and Grady, filed their opposition to the motion to intervene. On that date, a hearing was had on Donaldson's motion to intervene as respondent. Memoranda of law were filed in support of and in opposition to the motion and the matter was continued until January 16, 1969. On that date the court entered its order denying Donaldson's motion to intervene, and entered its order directing respondent's to comply with the Internal Revenue summons. This order was later stayed pending appeal. Notice of appeal was filed on the same day and the matter is here now for our consideration.

It may clarify the discussion here to begin by stating what is *not* involved. We do *not* have a case in which a subpoena has been issued at the instance of a special agent of the Internal Revenue Service against a *taxpayer* himself, seeking access to *his* records and papers and the right to take his testimony, such as was the case in *United States v. Cohen,* 9 Cir., 1967, 388 F. 2d 464; nor is it a case in which the subpoena seeks to obtain records *of the taxpayer* in the hands of his attorney or accountant, which the courts have deemed the same as if they were in the possession of the taxpayer himself. See *Reisman v. Caplin,* 375 U.S. 440, and this court's recent decision in *Stuart v. United States, et al,* 5 Cir., decided September 17, 1969, —F. 2d—; nor is it a case in which records actually belonging to the *taxpayer* are subpoenaed while in possession of some third person, but where no privilege exists.

To the contrary, what we have here is a subpoena served on two former employers of the taxpayer demanding the production of *their* own records, not the records of the *taxpayer*.

It would seem, upon the most casual observance of this situation, that if the United States were seeking to obtain these records in support of an actual prosecution, following indictment, appellant would have no basis for seeking to have the indictment quashed on the ground of a violation either of Fourth or Fifth Amendment rights, since there would have been no unreasonable search or seizure nor any compulsion of the taxpayer's giving evidence against himself. The issue that is here presented, therefore, depends solely upon the appellant's argument that the court's power to require a response to the subpoena must depend upon the validity of the original subpoena itself; that the Internal Revenue Code authorization for the issuing of a subpoena is restricted to the obtaining of records and testimony where no criminal prosecution is in prospect or in contemplation. By alleging, in its petition to intervene, that the subpoena was not truly issued for one of the purposes authorized under Section 7602, appellant claims he was entitled to intervene to raise this issue, since the employers were not concerned about protecting any rights of appellant.

To sustain his right to intervene, the appellant, in his brief, cites Rule 24(a) of the Federal Rules of Civil Procedure.[2] However, oral argument, appellant relied

[2] "(Rule 24(a): Intervention: (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

for his right to interene solely on *Reisman v. Caplin,* supra. He claims tha he should be given the relief of intervention as a maer of right. In order to test this question, since the tal court did not conduct an evidentiary hearing, we ıust look to the pleading by which appellant sought to iervene. Once again, it is necessary to point out what thepetition does *not* contend: (1) It does not contend tha the papers sought to be obtained from the former empyer were *his* papers; (2) he does not contend any condential relationship which under the rules of privilegevould entitle him to prevent a disclosure by his formermployer of any facts that might be relevant to the inquir being made. In effect, the petition alleges that he has anterest in the subject matter of the investigation, which,f course, he has, that is, whether or not there has been aleficiency in the tax returns or tax payments made by te taxpayer and/or whether or not such deficiency is ofuch a nature as to warrant recommendation of prosetion for a crime against the revenues. However, it do *not* allege any fact which, if found in his favor, would rrant the trial court's quashing the subpoena against thehird party.

The petition of tl United States and John P. Grady was supported by anffidavit by special agents Miller and Grady as follows:

> "In his capacy as special agent, he is assisting in the conduct of a investigation for the purpose of ascertaining the crect income tax liability of Merton H. Sweet, alsonown as Kevin L. Donaldson, for the years 1964 rough 1967 inclusive."

In his motion to intvene, appellant alleges:

> "Petitioner ›hn P. Grady, special agent, and Bruce B. Mill(special agent, New Orleans, Louis-

iana, are guilty of bad faith both with the court and the intervenor in asserting that they have been conducting an investigation to ascertain the correct income tax liability of Kevin L. Donaldson, for the calendar years 1964, 1965, 1966 and 1967.

"John P. Grady is a special agent assigned to the intelligence division, Internal Revenue Service, Tampa Florida, and Bruce B. Miller is a special agent assigned to the Intelligence Division, Internal Revenue Service, New Orleans, Louisiana.

"The function of the Intelligence Division is to enforce the criminal statutes applicable to tax laws by developing information concerning alleged criminal violations thereof.

"Special Agent Bruce B. Miller was assigned the investigation of Kevin L. Donaldson for the calendar years 1964, 1965, 1966 and 1967 for the express and sole purpose of obtaining evidence concerning any violations of the criminal statutes applicable to the tax laws of the United States and special agent John P. Grady is assisting special agent Miller in this investigation."

These, then, are the allegations of the complaint upon which the appellant bases his contention that the issuance of a subpoena in support of such an investigation is beyond the authority contained in Section 7604. In making this contention, appellant relies heavily upon language of the Supreme Court in *Reisman v. Caplin,* supra. The particular language relied upon is as follows:

"Furthermore, we hold that in any of these procedures before either the district judge or United States Commissioner, the witness may challenge the

summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, Boren v. Tucker, 9 Cir., 239 F. 2d 767, 772-773, as well as that it is protected by the attorney-client privilege, Sail v. U. S., 8 Cir., 228 F. 2d 682. In addition, third parties might intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, may intervene. See in Re: Albert Lindley Lee Memorial Hospital, supra, and Corbin Deposit Bank of Corbin, Ky. v. U. S. supra. . . ."

Appellant contends that since the function of the special agents is to investigate to see whether a crime has been committed, no subpoena can be issued under the authority of Section 7602 because of the language of the Reisman opinion *"this would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution,"* citing *Boren v. Tucker,* supra.

This argument goes too far. In the first place, it will be noted that under the express language of the Act, the subpoena may be served upon the taxpayer himself or upon any other person having records relevant to the inquiry. It is also apparent that *there is no express limitation on the face of the statute* that the power to make the investigation to — ascertain "the correctness of any return, making a return where none has been made, determining the liability for any person for any internal revenue tax" limits the inquiry to such as will result *solely* in a proposed deficiency in tax or deficiency plus civil fraud penalties. Nor is there any limitation expressed on

the face of the act that the inquiry may not be made if "determining the liability of any person for any internal revenue tax" or "ascertaining the correctness of [a] return" is made to assist the internal revenue service agents in determining *whether there is sufficient evidence that a crime against the revenues has been committed to warrant a recommendation* to the Justice Department that the case be marked for prosecution.

The investigation made by a special agent of the Internal Revenue Service, of which by this time the courts may take judicial notice, see footnote 3 in *Wild v. United States,* 9 Cir., 362 F. 2d 206, at page 208,[3] includes the duty of "developing information concerning alleged criminal violations, evaluating allegations and indications of such violations to determining investigations to be undertaken, investigating suspected criminal violations of such laws, recommending prosecution when warranted, and measuring effectiveness of the investigation and prosecution processes." Most significant, it seems to us, is the citation by the Supreme Court in *Reisman* as the basis

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[3]This footnote is as follows:

"30 Fed. Reg. 9399-9400 (July 28, 1965), 1966 CCH Stand. Fed. Tax Rep. §5988, which provides:

"1118.6 INTELLIGENCE DIVISION.

"The Intelligence Division enforces the criminal statutes applicable to income, estate, gift, employment, and excise tax laws (except those relating to alcohol, tobacco, narcotics and certain firearms), by developing information concerning alleged criminal violations thereof, evaluating allegations and indications of such violations to determine investigations to be undertaken, investigating suspected criminal violations of such laws, recommending prosecution when warranted, and measuring effectiveness of the investigation and prosecution processes. The Division assists other Intelligence offices in special inquiries, drives and compliance programs and in the normal enforcement programs, including those combating organized wagering, racketeering and other illegal activity, by providing investigative resources upon regional or National Office request. It also assists U.S. Attorneys and Regional Counsel in the processing of Intelligence cases, including the preparation for and trial of cases."

for its statements relative to criminal prosecutions, of the case of *Boren v. Tucker,* 9 Cir., 239 F. 2d 767. In the *Boren* case, the Ninth Circuit enforced the subpoena. In doing so, it distinguished the case of *United States v. O'Connor,* D.C. Mass., 1953, 118 F. Supp. 248. The *Boren* opinion pointed out that in *O'Connor,* an indictment had already been returned against the taxpayer; that there was no other pending investigation; and the special agent was used as a means to cause a subpoena to issue as if the case were still in the investigatory stage. Pointing out the difference between the *O'Connor* case and that pending before it, the Court of Appeals for the Ninth Circuit, in *Boren,* said:

> "It should be noted that the statute under consideration, by its language, does not limit the examination it authorizes solely to the issue of correctness. Section 76-02 authorizes an examination for the purpose of 'ascertaining the correctness,' 'determining the liability of any person for any internal revenue tax,' 'or collecting any such liability.' If a fraudulent tax return changes a taxpayer's liability, how could that fact be established without someone being required to come to a conclusion as to a possible criminal prosecution? Once an error has been established, it seems necessary for the examiner to come to some conclusion, one way or the other, as to whether there existed the possibility of criminal prosecution in the future. If no possibility exists, then one rule to determine liability comes into play — i.e., what tax should have been paid when the tax is correctly determined. If a possible criminal prosecution exists, then there is a possibility of another rule being used, the 50% penalty, to determine the correct tax. While it is true that once a possible criminal prosecution comes into existence

there can be no settlement of tax until that possibility has been ruled out, yet the existence of the possibility of criminal prosecution does not necessarily mean that there will be criminal prosecution. The ultimate decision may be, (1) civil liability for the correct tax, (2) liability for the tax plus penalty, (3) criminal prosecution, or (4) both the penalty and the criminal prosecution. Helvering v. Mitchell, supra; 26 U.S. C.A. §6653(b), 7201 et seq.

"In truth, we presume the 'Secretary or his delegate' would be unfaithful to his statutory responsibilities if in every examination, once an incorrect return has been demonstrated or established, he did not come to some preliminary conclusion as to whether there existed facts sufficient upon which to base a possible criminal prosecution, without coming to any conclusion as to whether there should be a criminal prosecution."

This court has recognized the same principle as stated in *Boren* in *Venn v. United States,* 5 Cir., 1968, 400 F. 2d at 210.

As we construe the motion to intervene, it simply says that since the subpoena has been issued by a special agent whose duty it is to aid in developing information relative to a possible prosecution this would amount to an "improper purpose of obtaining evidence for use in a criminal prosecution," within the language of the Supreme Court in *Reisman.*

In view of the fact that there is no allegation in the complaint that even the special agent had recommended a prosecution, much less that the Internal Revenue Service had sent the case to the Department of Justice for the purpose of presentation to a grand jury, the investigation being made by the special agents would still, in our view, come within the authority granted within 7602, as de-

scribed in the *Boren* opinion. A case which strongly supports this view is *In Re-Magnus, Mabee, Reynard, Inc.*, 2 Cir., 1962, 311 F. 2d 12.

We think it essential to bear in mind what seems to be so often unspoken in discussion of the power given under 7602 and 7604(b). Before indictment but after a potential criminal investigation commences, the courts have been somewhat troubled by the question of how much interrogation of the *taxpayer* is *constitutionally* permissible. Of course, after indictment, no subpoena can run against the accused.

There is no *constitutional* question as to the power of the Service to question, or subpoena records of *third parties* either before or *after* indictment. In cases in which the courts inveigh against the use of 7602 by a special agent, broad language is sometimes used to limit the authority because this effort has usually been made to obtain evidence from the taxpayer. The language is not apt and, is not controlling, if the subpoena power is being used to compel evidence by *third parties*. We have merely a problem of statutory construction of Section 7602.

There being no right which the appellant asserts that he could present to warrant the trial court's refusal to enforce the subpoena, the right to intervene has not been established. The language in *Reisman* "in addition, third parties might intervene to protect their interest, or in the event the taxpayer is not a party to the summons before the hearing officer, he too may intervene" is, of course, limited to the right to intervene if the person seeking the right can demonstrate to the court that he has interests to protect. Here, Donaldson's petition has alleged no such interest.

The trial court correctly denied the motion to intervene. The judgment is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1969

No. 27341

D. C. Docket No. Civ. 68-490 & 68-491-T

UNITED STATES OF AMERICA and
JOHN P. GRADY,

Petitioners-Appellees,

versus

JOSEPH J. MERCURIO and ACME
CIRCUS OPERATING COMPANY, INC.,

Respondents,

versus

KEVIN L. DONALDSON, f/k/a
MERTON H. SWEET,

Intervenor-Appellant.

Appeals from the United States District Court for the Middle District of Florida

---

Before TUTTLE, WISDOM and BELL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

It is further ordered that intervenor-appellant pay to petitioners-appellees, the costs on appeal to be taxed by the Clerk of this Court.

October 30, 1969

Issued as Mandate:

APPENDIX C

SECTION 7602 OF THE INTERNAL REVENUE CODE:

SECTION 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized —

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SECTION 7604. ENFORCEMENT OF SUMMONS.

(a) Jurisdiction of district court. — If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 942

KEVIN L. DONALDSON, F/K/A MERTON H. SWEET,
PETITIONER

v.

UNITED STATES OF AMERICA AND JOHN P. GRADY ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

1. In an investigation of the tax liability of petitioner, summonses were issued by a Special Agent of the Internal Revenue Service pursuant to Section 7602 of the Internal Revenue Code of 1954,[1] to the Acme Circus Operating Company, Inc., d/b/a Beatty-Cole Circus, and to an officer thereof, Joseph J. Mercurio, seeking records relating to petitioner's employment and compensation with that corporation for the

[1] "SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax

876-151—70

tax years 1964–1967, inclusive (R. 9–11, 47–49).[2] The Circus and its officer refused to comply with the summons on the ground that petitioner had theretofore obtained a preliminary injunction against them from a district court.[3] When the United States filed petitions with the district court to enforce the summonses, they pleaded willingness to comply with the summonses in the absence of the preliminary injunction. (R. 25–26, 60–61.)

Petitioner, relying on Rule 24(a)(2) of the Federal Rules of Civil Procedure,[4] filed a motion to intervene

---

or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

"(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

"(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

"(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."
(26 U.S.C. Sec. 7602.)

[2] "R." references are to the appendix printed in the court of appeals which has been certified to this Court.

[3] The preliminary injunction is found at R. 29.

[4] In the court of appeals, as is noted in its opinion (Pet. 14–15), petitioner abandoned reliance on Rule 24(a)(2) as the basis of intervention and relied solely on *Reisman* v. *Caplin*, 375 U.S. 440.

in the summons enforcement actions in the district court, alleging that it was his tax liability which was under investigation, and further alleging as follows (R. 16–17, 54–55):

> 2. Kevin L. Donaldson, the Intervenor, has an interest relating to the transactions which are the subject of this action and is so situated that the disposition of this action may, as a practical matter, impair or impede his ability to protect that interest unless the Intervenor's interest is adequately represented by existing parties, in that a judgment of this Court may adversely and prejudicially effect [sic] the substantial rights and privileges secured to him by the Constitution of the United States, as will more definitely appear from the Intervenor's proposed Answer, a copy of which is attached hereto.

In a proposed answer tendered with his motion to intervene, petitioner alleged, *inter alia,* the following defenses (R. 19–20, 57, 58):

> IX
>
> Petitioner [below], John P. Crady, Special Agent and Bruce B. Miller, Special Agent, New Orleans, Louisiana, are guilty of bad faith both with the Court and the Intervenor in asserting that they have been conducting an investigation to ascertain the correct income tax liability of Kevin L. Donaldson for the calendar years 1964, 1965, 1966 and 1967.
>
> * * * * *

XII

> Special Agent Bruce B. Miller was assigned the investigation of Kevin L. Donaldson for the calendar years 1964, 1965, 1966 and 1967 for the express and sole purpose of obtaining evidence concerning any violations of the criminal statutes applicable to the tax laws of the United States and Special Agent John P. Grady is assisting Special Agent Miller in this investigation.

The district court denied petitioner's motion to intervene and entered orders enforcing the summonses against Joseph J. Mercurio and the Acme Circus Company (R. 32, 33–35, 68–70). These orders were affirmed by the court of appeals (Pet. 22–23).

2. In *Reisman* v. *Caplin,* 375 U.S. 440, 449–450, this Court stated that in judicial proceedings to enforce Internal Revenue summonses:

> the witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, *Boren* v. *Tucker,* 239 F. 2d 767, 772–773, as well as that it is protected by the attorney-client privilege, *Sale* v. *United States,* 228 F. 2d 682. In addition, the third parties might intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, may intervene. See *In re Albert Lindley Lee Memorial Hospital, supra,* and *Corbin Deposit Bank* v. *United States, supra.* And this would be true

> whether the contempt be of a civil or criminal nature. Cf. *McCrone* v. *United States,* 307 U.S. 61 (1939); *Brody* v. *United States,* 243 F. 2d 378. Finally, we hold that such orders are appealable. * * * It follows that with a stay order a witness would suffer no injury while testing the summons.
>
> Nor would there be a difference should the witness indicate—as has Peat, Marwick, Mitchell & Co.—that he would voluntarily turn the papers over to the Commisioner. If this be true, either the taxpayer or any affected party might restrain compliance, as the Commissioner suggests, until compliance is ordered by a court of competent jurisdiction. * * *

In the instant case, the court of appeals held that the taxpayer's mere interest in the subject matter of the investigation, *i.e.,* his own tax liabilities, is not a sufficient interest to justify intervention by him in the absence of allegations that he has an interest in property or in privileged relationships which he is entitled to protect. The government contends that this decision is a correct application of *Reisman* v. *Caplin, supra.* However, although the decisions are distinguishable from the instant case on their facts, other circuit courts appear to read *Reisman* more broadly. In particular, the Seventh Circuit in *United States* v. *Benford,* 406 F. 2d 1192, held that the facts in *Reisman* were not to be considered as a limitation on the language in that case suggesting the right to intervene. The *Benford* case held that the taxpayer is entitled to intervene solely on the basis of being the person whose taxes are being investigated.

The effective use of Internal Revenue summonses by the Commissioner of Internal Revenue has been seriously impaired by the rapidly increasing allowance of intervention by taxpayers and the ensuing delays caused by the extensive use of discovery procedures and the complications in hearings caused by the necessity of hearing the additional adversary parties involved after intervention is allowed. It is common for the enforcement of a single summons to require two years of litigation, and it is not uncommon for a single taxpayer to obtain temporary restraining orders and preliminary injunctions against as many as 20 witnesses whom the Internal Revenue Service wishes to interview. See Meldman, *Taxpayers' Efforts to Restrain Third Party Witnesses' Compliance with a Summons,* 46 Taxes 685 (1968); Meldman, *Procedures in Tax Controversies,* 51 Marq. L. Rev. 288–331 (1967–1968).

Finally, it has become necessary in almost every Internal Revenue summons enforcement proceeding to argue and litigate the contention of the respondent or intervenor that the summons is improper if the investigation includes an effort by the Internal Revenue Service to determine whether the tax delinquencies include criminal violations. The dispute revolves on the meaning of this Court's language in *Reisman, supra,* and on its reference to the right to judicial review of an administrative summons which is issued for an "improper purpose" in *United States* v. *Powell,* 379 U.S. 48, 58. Since the court below held that no "improper purpose" existed merely because the

investigation might disclose a criminal violation, this issue would appear to be embraced in a grant of certiorari to review the right of petitioner to intervene in this case.

In light of the importance of the issue tendered and the differing approaches followed by the courts of appeals, the United States does not oppose the grant of a writ of certiorari to review the issues presented in the instant petition.

Respectfully submitted.

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FEBRUARY 1970.

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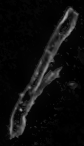

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IN THE

Supreme Court of the United States

October Term, 1969

No. 942

KEVIN L. DONALDSON, f/k/a
MERTON H. SWEET, *Petitioner*

v.

UNITED STATES et al., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The orders of the district court denying intervention and enforcing the Internal Revenue Summonses (A. 33, 34) are not officially reported. The opinion of the Fifth Circuit Court of Appeals, (A. 42) is reported at 418 F. 2d 1213.

JURISDICTION

The judgment of the United States Court of Appeals was entered on October 30, 1969. (A. 53) Petition for Writ of Certiorari was filed December 11, 1969 and certiorari was granted February 27, 1970. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I

Whether the taxpayer under investigation has a right to intervene in proceedings seeking judicial enforcement of Internal Revenue Summonses issued to third parties.

II

Whether Internal Revenue Summonses issued in a criminal investigation for the primary purpose of obtaining evidence for use in a criminal proceeding are invalid and unenforceable being outside the scope of Section 7602 of the Internal Revenue Code of 1954.

III

Whether an intervening taxpayer is entitled to a full adversary hearing in challenging enforcement of administrative summonses issued by the Internal Revenue Service.

STATUTES INVOLVED

The statutory provisions involved are Section 7602 and Section 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C. §7602 and §7604(a), Rules 24(a)(2)

and 81(a)(3) Federal Rules of Civil Procedure, which provisions are set forth in the Appendix hereto, pages 47, 48.

STATEMENT

Petitioner, Kevin L. Donaldson, (hereinafter referred to as the Taxpayer), is under investigation by the Internal Revenue Service. (A. 9) Respondent, John P. Grady, is a Special Agent employed in the Intelligence Division of the District Director of Internal Revenue in Tampa, Florida, assisting in the conduct of an investigation of the Taxpayer, for the years 1964 through 1967, inclusive. Respondents, Joseph J. Mercurio and Acme Circus Operating Company, Inc.[1] are third party witnesses to whom the Summonses in question were directed.

Two related actions were commenced by the United States and Special Agent Grady in the United States District Court for the Middle District of Florida to enforce Internal Revenue Service Summonses issued to the third party witnesses, Joseph J. Mercurio and Acme Circus Operating Company, Inc.[2] The Taxpayer sought to intervene in the proceedings and was denied intervention. Thereafter, the District Court ordered the production of documents from and the testimony of the third parties without a hearing. The Taxpayer appealed from these Orders. The United States Court of Appeals for the Fifth Circuit affirmed the District Court Orders

---

[1]The Court of Appeals designated these parties as "Two former employers of the taxpayer" (A. 43), a determination which finds no support in the record.

[2]The two Summonses and the proceedings in the District Court being nearly identical, only the Mercurio record has been reproduced in the Appendix.

holding the right to intervene had not been established. A timely Petition for Writ of Certiorari was filed and granted.

The Taxpayer, in September 1968, aware that the Internal Revenue Service contemplated issuing summonses to Joseph J. Mercurio and Acme Circus Operating Company, Inc. moved the United States District Court, Middle District of Florida, Tampa and Jacksonville Divisions, for a Preliminary Injunction and Temporary Restraining Order, temporarily enjoining and restraining Mercurio and Acme, respectively, from complying with any summons which may be issued subsequently until such time as an order of a court of competent jurisdiction had been issued requiring such compliance. The District Courts found that immediate compliance with the requests made by the Internal Revenue Service appeared to threaten a violation of the Taxpayer's constitutional rights and cause immediate and irreparable injury, loss or damage. Whereupon, the Courts granted a Preliminary Injunction and a Temporary Restraining Order. (A. 27)

Pursuant to the Preliminary Injunction and Temporary Restraining Order, Mercurio and Acme, respectively, refrained from complying with the Summonses issued to them by Special Agent John P. Grady. (A. 4)

On November 25, 1968, two Petitions were filed in the United States District Court for the Middle District of Florida, Tampa Division, by the United States of America and John P. Grady, Special Agent, to enforce the Internal Revenue Summonses issued to Mercurio and Acme. Enforcement of the Summonses was sought pursuant to Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954. (A. 3)

Each Petition alleged that Special Agent John P. Grady, was assisting in an investigation being conducted by Special Agent Bruce B. Miller, New Orleans, Louisiana, for the purpose of ascertaining the correct income tax liability of the Taxpayer, for the years 1964 through 1967, inclusive, and annexed Affidavits of the Special Agents. (A. 4, 6, 12)

The two Summonses in question required Mercurio and Acme to appear and give testimony concerning the alleged tax liability of the Taxpayer; to produce for inspection the books and records of Acme Circus Operating Company, Inc. d/b/a Clyde Beatty-Cole Bros. Circus relating to employment, compensation and expense reimbursement or other financial transactions with the Taxpayer for the years 1964 through 1967, inclusive. (A. 9)

On November 29, 1968, the District Court issued Orders to Show Cause directing Mercurio and Acme to appear on December 20, 1968, and to show cause why they should not be compelled to comply with the Internal Revenue Summonses. It was further ordered that the Respondents, Mercurio and Acme and *any other interested person shall file a written response to said petition within ten (10) days after service of said petition and attached exhibits.*[3] (A. 16)

On December 9, 1968, the Taxpayer filed Motions to Intervene and Answers in each of the enforcement proceedings, under Rule 24(a)(2) of the Federal Rules of Civil Procedure, admitting or denying various allegations of the Petitions and setting forth good faith affirmative defenses to enforcement. (A. 17, 19)

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[3]The Taxpayer was formally served with copies of the Petitions. (A. 5)

In his Motion to Intervene, Taxpayer alleged that it was his tax liability that was in issue in the proceedings; that his interest would not be adequately protected by the respective Respondents, Mercurio and Acme; and, that a judgment of the District Court may adversely and prejudicially affect the rights and privileges secured him by the Constitution of the United States. (A. 17)

In each Answer, Taxpayer alleged that he was the subject of a criminal investigation through which evidence was being procured for criminal prosecution and the administrative Summons issued by the Internal Revenue Service was improper, being without the scope of Section 7602 of the Internal Revenue Code of 1954. (A. 21)

The Answers of Mercurio and Acme, filed on December 9, 1968 and December 13, 1968, respectively, admitted the essential allegations of the Petitions and alleged that were it not for the Preliminary Injunction and Temporary Restraining Order they would have complied with the Summonses. (A. 25)

The United States filed an Opposition to the Intervention Motions alleging that the Taxpayer had no legal, equitable, possessory or other interest in the summoned records and therefore had no standing to object to the enforcement since intervention would afford him no relief. Further alleging, that the Taxpayer would not be bound by any judgment rendered, and the issues sought to be raised in the enforcement proceeding were properly the subject of another cause at another time. Finally, that "intervention would unduly delay and encumber the expeditious adjudication of the rights of the original parties." (A. 31)

The District Court on January 16, 1969, denied Taxpayer's Motions to Intervene and ordered enforcement of the Summonses, upon consideration of the pleadings, memoranda of the parties and argument of counsel, but without benefit of any testimony. (A. 33, 34)

The Court of Appeals affirmed the District Court Orders. The Fifth Circuit held the right to intervene had not been established, concluding the Taxpayer alleged no interest which warranted the trial court's refusal to enforce the Summonses. (A. 52) The Opinion seemingly holds that Intervention in summons enforcement actions is limited to factual situations where a taxpayer alleges a legal or equitable claim to the records sought, a proprietary interest or privileged relationship. (A. 44, 46)

SUMMARY OF ARGUMENT

I

Taxpayer, asserting that Summonses issued by the Internal Revenue Service to third party witnesses were outside the scope of statutory authority and that compliance would violate his constitutional rights, enjoined the third party witnesses' voluntary compliance pending full judicial review.

The Internal Revenue Code authorizes the issuance and enforcement of administrative summonses in aid of a determination or collection of a civil tax liability. Likewise, certain other statutory provisions afford persons summoned and interested parties, as the Taxpayer, a full opportunity to challenge the validity of summonses and to assert their rights and claims.

The Taxpayer's intervention in the enforcement proceedings is by virtue of Rule 24(a)(2) Federal Rules of Civil Procedure. Under the Federal Rules an individual may intervene, as a matter of right, when disposition of the pending action, in which he has an interest, will impede his ability to protect his interest unless adequately represented by existing parties.

Considering that it was Taxpayer's rights, as the real party in interest, which were at issue in the District Court, and that Mercurio and Acme were "nominal parties" unconcerned with the ultimate disposition of the action, Taxpayer was entitled to intervention under Rule 24(a)(2) Federal Rules of Civil Procedure.

Judicial decisions in various circuits had limited the objections that could be asserted by summoned parties or intervening taxpayers. This Court eliminated the distinction between the parties summoned and those affected by a disclosure, as the Taxpayer, assuring both the opportunity to appear or intervene in actions seeking judicial enforcement and to challenge the summons by asserting constitutional or other claims. *Reisman v. Caplin,* 375 U.S. 440 (1964).

The Commissioner of Internal Revenue having invoked the court's process to enforce an administrative summons must meet certain standards to obtain judicial enforcement. He must show that the investigation has a legitimate purpose, his inquiries relevant, the information sought not within his possession and that the administrative steps required by the Internal Revenue Code have been followed. *United States v. Powell,* 379 U.S. 48 (1964).

The court below, contrary to both *Reisman v. Caplin,* 375 U.S. 440 (1964) and *United States v. Powell,* 379

U.S. 48 (1964), limited intervention to proceedings seeking production of documents belonging to a taxpayer, the work product of his attorney, or documents in which the taxpayer claimed some proprietary interest, or evidentiary claim of privilege. To accord such an interpretation to *Reisman* and *Powell,* would render futile this Court's clear and careful delineation of "other appropriate grounds" upon which the enforcement of a summons may be challenged.

II

Although discussion of the substantive issue of the "improper purpose" of a summons is not ripe for adjudication, since the District Court did not conduct an evidentiary hearing, the Court of Appeals denied intervention finding no "improper purpose" existed to warrant the trial court's refusal to enforce the Summonses. In light of the decision of the court below, consideration must be given to the meaning of this Court's language in *Reisman v. Caplin,* 375 U.S. 440 (1964) and reference to the right of judicial review of an administrative summons issued for an "improper purpose" authorized by *United States v. Powell,* 379 U.S. 48, 58 (1964).

Section 7602 of the Internal Revenue Code of 1954 expressly enumerates the purposes for which the Internal Revenue Service is authorized to issue a summons in connection with the Revenue Laws of the United States.

The United States has consistently asserted that Section 7602 contains no limitations and authorizes the determination of tax liabilities by Agents of the Treasury, whatever the purpose and whatever the ultimate outcome. Reported court decisions are not in accord, but hold that whether a summons is enforceable depends

upon the particular factual pattern established and the nature and manner of investigation upon which the Service has embarked and pursued.

It is essential to distinguish a civil tax case, fraught with suspicion of fraud, and a situation where a full-fledged criminal investigation is being pursued. Where the primary purpose for which a summons is issued, is in conjunction with an inquiry with dominant criminal overtones and no longer solely a civil investigation, an administrative summons is void and unenforceable.

Although this Court has never passed on the question, it is submitted that, when an investigation conducted by Internal Revenue Service Agents has turned from the investigatory stage to one accusatory in nature, the use of administrative summonses under Section 7602 is clearly without the scope of Congressional intent.

III

The District Court in summarily dismissing Taxpayer's Motion to Intervene concomitantly: denied him the right to an evidentiary hearing compelling the Government to show the legitimate purpose of the Summonses and the necessity of the records and testimony sought; determined that such records and information were not already in the Government's possession; and, denied the right to cross-examine government witnesses, elicit testmony and seek production of documentary evidence on the issues which were properly before the court.

Aware that the Internal Revenue Service contemplated issuing summonses to Respondents Mercurio and Acme and having been advised of Respondents' intention to voluntarily comply with such requests, Taxpayer obtained Orders restraining their compliance until such time as a further order of a court of competent jurisdiction was issued. Full judicial review, inherent in the courts' restraining orders contemplated a hearing which would exhaust all issues submitted or which were a proper subject for submission to the court.

In the case at bar where the District Court has neither taken testimony, nor, permitted Taxpayer to submit evidence in an effort to refute the Government's *prima facie* case made in its pleadings and affidavits, there has been no adversary proceeding as required by *United States v. Powell,* 379 U.S. 48 (1964).

ARGUMENT

I

A TAXPAYER UNDER INVESTIGATION HAS A RIGHT TO INTERVENE IN PROCEEDINGS SEEKING JUDICIAL ENFORCEMENT OF INTERNAL REVENUE SUMMONSES TO THIRD PARTIES

In *Reisman v. Caplin,* 375 U.S. 440 (1964), where the petitioners sued to enjoin enforcement of a summons issued to an accounting firm engaged by them, the Solicitor General devoted special attention to the importance of raising objections to a summons initially at the administrative level[4], and, also tendered an alternative procedure where voluntary disclosure would seem imminent:

> There remains the possibility that Peat-Marwick might voluntarily turn the papers over to the Commissioner instead of waiting for the return day, when both petitioners and Bromley would have a chance to be heard. * * * [*E*]*ither petitioners or Bromley are free to bring an action against Peat-Marwick to compel Peat-Marwick to respect any rights the complainants have in the papers, subject only to Peat-Marwick's duty to comply with any valid court order enforcing the Commissioner's summonses.* That would bar voluntary surrender and

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[4](Brief for the Respondent Caplin, p. 8, *Reisman v. Caplin,* 375 U.S. 440 (1964) Sup. Ct. No. 119, Oct. Term 1963.):

> "* * * Under orderly procedures established by Code, persons summoned and interested third parties may raise objections to the validity of the summonses and assert their constitutional rights in administrative proceedings before a Special Agent."

> *force a proceeding under the Code in which petitioners and Bromley could intervene and assert their respective rights.* (Brief for the Respondent Caplin, p. 29, *Reisman v. Caplin,* 375 U.S. 440 (1964) Sup. Ct. No. 119, Oct. Term 1963.) [Emphasis supplied]

In the case at bar, the Taxpayer followed the procedure adopted in *Reisman v. Caplin,* as recommended by the Solicitor General. (Facts p. 4, herein)

A. Taxpayers Are Entitled To Intervention In Summons Enforcement Proceedings Pursuant to Federal Rules of Civil Procedure 24(a)(2).

The application of Rule 24, Federal Rules of Civil Procedure, in summons enforcement proceedings is not disputed.[5] This Court has determined the general applicability of the Federal Rules of Civil Procedure in enforcement proceedings. *United States v. Powell,* 379 U.S 48, 58 (1964) Footnote 18:

> Because §7604(a) contains no provisions specifying the procedure to be followed in invoking the court's jurisdiction, the Federal Rules of Civil Procedure apply, *Martin v. Chandis Securities Co.,* 9

[5]The United States on brief in *Reisman v. Caplin,* 375 U.S. 440 (1964), [Brief for the Respondent Caplin, p. 16, *Reisman v. Caplin,* Sup. Ct. No. 119, Oct. Term 1963.] conceded:

> "• • • Interested third parties may also appear and assert their rights to nondisclosure of documents or information.[2]"

[2]*Foster v. United States,* 265 F. 2d 183, 185 (C.A. 2), certiorari denied, 360 U.S. 912; *In re Albert Lindley Lee Memorial Hospital,* 209 F. 2d 122, 123 (C.A. 2), certiorari denied sub non. *Cincotta v. United States,* 347 U.S. 960; *Corbin Deposit Bank of Corbin v. United States,* 244 F. 2d 177 (C.A. 6); *In re Magnus, Mabee & Reynard, Inc.,* 311 F. 2d 12, 18 (C.A. 2) (concurring opinion), certiorari denied 370 U.S. 918; *Rule 24, Federal Rules of Civil Procedure.* (Emphasis Supplied)

> Cir., 128 F. 2d 731. The proceedings are instituted by filing a complaint, followed by answer and hearing. * * *

Rule 24(a), which permits intervention as of right, was amended in 1966, and now imposes on the party opposing intervention the burden of showing the adequacy of the representation by the existing parties.[6]

In the case at bar, the existing parties, Mercurio and Acme, have no interest in the outcome of the litigation. Their Answers except for pleading lack of knowledge concerning the association of Special Agents Grady and Miller in an investigation of Taxpayer's tax liability, admitted the allegations of the Petition and reconfirmed their willingness to voluntarily comply with the Summonses, absent the orders restraining them. (A. 25) Mercurio and Acme are not active parties in the present review by this Court.[7] Upon the record, the United States has failed to sustain the burden of showing the

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[6] *Nuesse v. Camp*, 385 F. 2d 694, 702 (C.A. D.C. 1967):

> "The Commissioner's right to intervene as a party depends also on whether his interest is adequately represented by existing parties. See generally Annot., 84 A.L.R. 2d 1412 (1962). The prior text of Rule 24 spoke in terms of whether representation by existing parties 'is or may be inadequate'. The present rule provides for intervention 'unless the applicant's interest is adequately represented by existing parties.'
>
> "While the change in wording does not relate to any change in standard as such, *it underscores both the burden of those opposing intervention to show the adequacy of the existing representation and the need for a liberal application in favor of permitting intervention.*" (Emphasis Supplied)

[7] Through their counsel, the Clerk of this Court was advised under date of December 30, 1969:

> "As Joseph J. Mercurio and Acme Circus Operating Company, Inc., both stand ready to follow the orders of the court, and are nominal parties only, no appearance will be filed on behalf of either party in the United States Supreme Court."

adequacy of Taxpayer's representation by existing parties.

Recent decisions interpreting the effect of the 1966 amendments to Rule 24(a) of the Federal Rules of Civil Procedure considered the "required interest" necessary to warrant intervention. The Court of Appeals for the District of Columbia Circuit in *Nuesse v. Camp,* 385 F. 2d 694, 700 (C.A. D.C. 1967) promulgated the following guidelines:

> * * * We know of no concise yet comprehensive definition of what constitutes a litigable 'interest' for purposes of standing and intervention under Rule 24(a). One court has recently reverted to the narrow formulation that 'interest' means 'a specific legal or equitable interest in the chose'. *Toles v. United States,* 371 F. 2d 784 (10th Cir. 1967). We think a more instructive approach is to let our construction be guided by the policies behind the 'interest' requirement. We know from the recent amendments to the civil rules that in the intervention area the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process. * * *

Similarly, cognizant of the significance of the 1966 Amendments, the Court of Appeals for the Fifth Circuit re-examined the application of Rule 24, as amended, in *Atlantis Development Corporation v. United States,* 379 F. 2d 818, (C.A. 5, 1967) and reversed the order denying intervention.[8]

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[8]The court in *Atlantis* observed at page 829:

> "* * * [I]t is 'as a practical matter' a certainty that an absent party seeking a right to enter the fray to advance his interest against all or some of the parties as to matters upon which he is for all practical purposes shortly to be foreclosed knows the disposition in his absence will 'impair or impede his ability to protect that interest, * * *.' F.R. Civ. P. 24(a)(2). * * *"

During the forepart of September 1968, the Respondents Mercurio and Acme were and remain enjoined and restrained from complying with any summons issued by the Internal Revenue Service. (A. 27) At that time Taxpayer clearly demonstrated to the District Courts that immediate irreparable damage, loss and injury would result to him; that Mercurio and Acme could not adequately represent his interests; and, that he would be bound subsequently by the acts of the Respondents. (A. 27)[9] It is inconceivable, as well as illogical, to suppose that Taxpayer's interests, and, adequacy of representation, which formulate the issues of this case, have been either lost or resolved. To the contrary they remain of the same consequential nature to him as when the restraining orders were issued.

Equally perplexing in light of the Government's strenuous efforts to preclude Taxpayer's intervention is the United States' formal service of their Petitions to Enforce Internal Revenue Summons and attached Orders to Show Cause upon Taxpayer's attorney (A. 5) considering that the District Court's order by its terms was only directed to the Respondents and *any other interested person*. (A. 16)

It is submitted that Taxpayer has a definite, vital and certain interest in the records sought. Such records, as

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[9]Although the United States was not made a party, it was informed of the District Court action. The attitude of the Government was expressed in a letter to another District Court:

> It is our position that this matter is governed by the principle enunciated in *Reisman, et al. v. Caplin, et al.*, . . .
>
> [T]herefore, . . . there is no jurisdiction over the United States or any of its agents in this action, nor could there be unless and until the Government seeks judicial enforcement of the summonses.

Meldman, *Taxpayers Efforts to Restrain Third Party Witnesses' Compliance With a Summons*, 46 TAXES, November 1968, p. 685, 687.

is every case of this type, allegedly reflect financial dealings between a taxpayer and the person summoned as they relate to an alleged tax liability. Therefore, intervention in this matter should be ordered so that Taxpayer's challenges may be heard and determined by the trial court.

B. *Under The Doctrine of Reisman v. Caplin, 375 U.S. 440, Taxpayers May Intervene In Summons Enforcement Proceedings.*

This Court, in *Reisman v. Caplin,* 375 U.S. 440 (1964), determined the rights of Internal Revenue Service Agents to enforce administrative summonses issued under Section 7602 of the Internal Revenue Code of 1954, and the concomitant rights of witnesses, third parties, taxpayers, and other parties affected. Prior judicial decisions in various circuits had limited the types of objections that could be asserted by third parties summoned or intervening taxpayers.[10] The *Reisman* decision eliminated these distinctions by expressly providing that:

> * * * [B]oth parties summoned and those affected by a disclosure may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims. (375 U.S. at 445)

The Court of Appeals in denying Taxpayer intervention seemingly concluded that this Court's decision in *Reisman* must be confined to factual patterns where the taxpayer has established a legal or equitable claim to

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[10] *Foster v. United States,* 265 F. 2d 183 (C.A. 2, 1959), cert. den. 360 U.S. 912 (1959); *Hubner v. Tucker,* 245 F. 2d 35 (C.A. 9, 1957); *DeMasters v. Arend,* 313 F. 2d 79 (C.A. 9, 1963); *In re Magnus Mabee & Reynard, Inc.,* 311 F. 2d 12 (C.A. 2, 1962), cert. den. 373 U.S. 902 (1963).

the records sought by way of a proprietary interest or privileged relationship. (A. 44, 46) This is not a proper construction of the Court's decision in *Reisman v. Caplin,* 375 U.S. 440 (1964) and is in direct conflict with the Courts of Appeal for the Seventh Circuit in *United States v. Benford,* 406 F. 2d 1191 (C.A. 7, 1969) for the Third Circuit in *United States v. Bank of Commerce,* 405 F. 2d 931 (C.A. 3, 1969) and for the Sixth Circuit in *Justice v. United States,* 365 F. 2d 312 (C.A. 6, 1966).

In *Reisman v. Caplin,* 375 U.S. 440 (1964) petitioners, attorneys on behalf of certain taxpayers, sought declaratory and injunctive relief against the Commissioner of Internal Revenue with respect to Internal Revenue Service summonses that had been served on an accounting firm relative to the taxpayer's alleged tax liability. In sustaining the lower court's denial of this *independent relief,* this Court noted that complete relief could be afforded the taxpayers when the Internal Revenue Service sought to enforce summonses pursuant to those sections of the Internal Revenue Code invoked by Taxpayer in the instant case.

Specifically holding that a taxpayer could intervene to protect his interest when the Government attempted to enforce a summons against a third person this Court stated: (375 U.S. at 445)

> * * * This Court has never passed upon the rights of a party summoned to appear before a hearing officer under §7602. However, the Government concedes that a *witness or any interested party may attack the summons before the hearing officer.* There are cases among the circuits which hold that *both parties summoned and those affected by a disclosure may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims. In re Albert Lindley Lee*

Memorial Hospital, 209 F. 2d 122 (C.A. 2d Cir.); *Falsone v. United States,* 205 F. 2d 734 (C.A. 5th Cir.); and *Corbin Deposit Bank of Corbin, Ky. v. United States,* 244 F. 2d 177 (C.A. 6th Cir.) * * * [Emphasis Supplied]

1. *Reisman does not suggest that the categories of "any interested party" or "those affected by a disclosure" are limited to persons having a proprietary interest in the records summoned.*

On the contrary, expressions of agreement with the decisions in *In re Albert Lindley Lee Memorial Hospital,* 209 F. 2d 122 (C.A. 2, 1953) cert. den. sub. non. *Cincotta v. United States,* 347 U.S. 960 (1954) and *Corbin Deposit Bank v. United States,* 244 F. 2d 177 (C.A. 6, 1957) demonstrate that no such interest is required. In *Lindley Lee Memorial Hospital,* the taxpayer, a doctor, was granted leave to intervene in the proceedings brought in the District Court to enforce an Internal Revenue Summons for a *hospital's records,* showing the names and addresses of the doctor-taxpayer's patients. The records belonged to the hospital, not the doctor; similarly, the records in the instant case belong to Acme Circus Operating Company, Inc., rather than to Taxpayer.

Although the doctor-taxpayer contended that the hospital's compliance would violate the privileged communications between physician and patient, the Court of Appeals rejected this contention. Under New York law, should it be applicable, the disclosure by the hospital of the names and addresses of the doctor-taxpayer's patients was obviously not privileged information. The Court,

however, determined that Federal law must be controlling and affirmed the District Court decision[11].

To assume that a naked assertion of privilege by a taxpayer in third party enforcement actions creates additional rights or standing to intervene would make shambles of judicial proceedings.

In *Corbin Deposit Bank v. United States,* 244 F. 2d 177 (C.A. 6, 1957), an Internal Revenue Summons was issued seeking the bank records of a taxpayer's transactions. The taxpayer contended that he had previously been examined by the Service and that under Section 7605 of the Internal Revenue Code of 1954, the Internal Revenue Service must establish reasonable grounds for a suspicion of fraud. Irrespective of the present merits of the taxpayer's allegation, in *Corbin Deposit Bank,*[12] a lack of proprietary interest in the bank records did not prevent that taxpayer from asserting and obtaining judicial review of his challenges.

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[11]*In re Albert Lindley Lee Memorial Hospital,* 209 F. 2d 122, 123 (C.A. 2, 1953) cert. den. sub. non. *Cincotta v. United States,* 347 U.S. 960 (1954):

> "* * * In a careful and able opinion * * * Judge Brennan decided the case on the basis of New York law. He concluded that the state decisions permit a doctor to testify to the fact that he attended a patient professionally, although the statute forbids disclosure of the nature of the patient's illness;[1] and *a fortiori* a hospital should be permitted to testify as to its admission of a patient and who was the patient's doctor.[2] (Footnotes omitted)
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> * * *
>
> "If we thought New York law controlling, we should have nothing to add to Judge Brennan's opinion since we are satisfied that he has correctly analyzed the state cases. But determination of what evidence is admissible in an income tax investigation authorized by 26 U.S.C.A. §3614(a) is a matter to be decided according to federal law. * * *"

[12]See *United States v. Powell,* 379 U.S. 48 (1964).

The Court below has introduced heretofore non-existent ambiguities and equivocation into *Reisman v. Caplin,* 375 U.S. 440 (1964), founded solely upon an interpretation of the cases which this Court considered in arriving at its decision. Taxpayer advances this proposition in accord with the logical interpretation of *Reisman* which numerous recognized members of the profession have accorded it in published articles.[13] In the later case of *United States v. Powell,* 379 U.S. 48 (1964), also involving the enforcement of an Internal Revenue Summons, this Court further delineated what the Commissioner must show in order to enforce the summons, and what the taxpayer may show in order to attack the summons.

Taken together, *Reisman v. Caplin* and *United States v. Powell,* established that a taxpayer, directly when the summons is issued to him, or through intervention when the summons is issued upon a third party, may challenge the summons when judicial enforcement is sought on grounds such as those alleged by Taxpayer: (1) that a constitutional right of the taxpayer is being infringed, (2) that the material is sought for the improper purpose of obtaining evidence in a criminal investigation, and (3) that the summons had been issued to harass the taxpayer, put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the investigation.

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[13]See Mahon, *Limitations Upon the Commissioner: Power to Audit; to Summon; to Assess; Remedies Available to the Taxpayer,* 24 Institute on Federal Taxation 1 (1966); Bender, *The Implications of Reisman v. Caplin In Fraud Cases,* 23 Institute on Federal Taxation, 1293 (1965).

2. *Although a conflict exists among the Circuits in construing Reisman and Powell, it is submitted that the better reasoned view is that adopted by the Third, Sixth and Seventh Circuit Courts of Appeal.*

United States v. Bank of Commerce, 405 F. 2d 931 (C.A. 3, 1969), and *Justice v. United States,* 365 F. 2d 312 (C.A. 6, 1966) involved the enforcement of summonses issued to banks. The courts in these cases experienced no problem in allowing intervention to the taxpayer although he may not have had a proprietary interest in the documents demanded. The taxpayer did have a definite interest in the records sought since they contained his dealings with persons summoned, and reflected on his alleged tax liabilities. Cf. *Application of Cole,* 342 F. 2d 5, 7-8 (C.A. 2, 1965), cert. den. 381 U.S. 950 (1964), where the *sole* question presented was whether the Internal Revenue Service, when it issues a summons to a third person under Section 7602, is required to give the taxpayer notice of the issuance.

Discussing a taxpayer's intervention in summons enforcement proceedings, the Court of Appeals in *Justice v. United States,* 365 F. 2d 312, 314 (C.A. 6, 1966) adopted the guidelines established in *Reisman v. Caplin,* 375 U.S. 440 (1964) and further commented:

> Upon consideration of the motion of the taxpayers to intervene, the Court finds these proceedings under Section 7604(b) are properly before the Court. The questions raised as to the Taxpayers' constitutional rights and their *rights and privileges under the various revenue statutes* must be heard and determined by the District Court under the Federal Rules of Civil Procedure. See Rules 24 and 81(a)(3).
>
> The Court finds it is probable that the representation of the Taxpayers' interest by existing parties

> may be inadequate and that the Taxpayers may be bound by a judgment in the action. This Court is of the opinion that unless the Taxpayers are permitted to intervene, they would not be aggrieved parties, entitling them to an appeal. (Emphasis supplied)

The Court in *United States v. Bank of Commerce,* 405 F. 2d 931, 933 (C.A. 3, 1969) observed that it is the contents of the third parties' books and records and not the tangible records themselves in which the taxpayer has a protectable interest and concluded:

> At the outset, we are confronted by the appellee's contention that the appellant lacks standing to raise the objections which he asserts. We do not agree. The rule approved by the Supreme Court in Reisman v. Caplin, 375 U.S. 440 (1964), * * * is that a taxpayer may intervene in an enforcement proceeding and challenge enforcement of the summons by raising constitutional or other objections in protection of his rights and interests. Here, *appellant's defenses, as he styles them, are aimed solely at protecting his individual rights and interests. Appellant makes no claim on behalf of the bank, either derivatively or in a representative capacity.* (Emphasis supplied)

The Courts in *Justice* and *Bank of Commerce* reached certain conclusions on which they based their decisions, that, in every respect, conform to the instant situation.

First, the Courts noted that the taxpayers were raising certain rights and privileges under the revenue statutes. Taxpayer here raises like defenses as to the records and testimony sought. Further, in *Justice* and *Bank of Commerce,* the Courts concluded that the taxpayer's interest would not be adequately represented by the existing parties. In this respect, Taxpayer was found to possess a

definite interest, evidenced by the rendition of Orders restraining Respondents, and, consequently, an interest not susceptible of being fully protected by the existing parties. And finally, both Courts found that the taxpayer may be bound by any judgment rendered in the action. The Taxpayer will likewise be bound as a result of the judgment rendered in the present enforcement proceedings.

A taxpayer's right to intervene in a judicial proceeding wherein the Internal Revenue Service seeks to enforce its summons issued in connection with the taxpayer's alleged tax liability is unequivocally supported by the decision of the Court of Appeals for the Seventh Circuit in *United States v. Benford,* 406 F. 2d 1191 (C.A. 7, 1969). The District Court in *Benford* denied intervention holding that *Reisman v. Caplin* and *United States v. Powell* do not alleviate the necessity of showing a proprietary or other special interest in the records subject of a revenue summons, and that being the taxpayer whose liability is under scrutiny is not alone sufficient a basis for intervention. The Court of Appeals responded stating: (406 F. 2d at 1193, 1194)

> If the import of *Reisman* and *Powell* were closely confined to their facts, we could well agree with the district court.
>
> * * *
>
> But the opinions did not qualify the broad statements that 'both parties summoned and those affected by a disclosure may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims';[5] that 'In addition, third parties might intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he,

too, may intervene';[6] that 'This does not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered."[7] *The opinions did not expressly, and, as we read them, did not impliedly, limit the taxpayer's right to intervene in enforcement proceedings to situations where a legally protected interest in the records could be shown.* Had the Court intended simply to hold that the particular interests of the taxpayers involved in those cases were sufficient bases for intervention, the opinions would doubtless have made that evident. We interpret them as adopting the judicial policy with respect to I.R.S. inquisitorial summonses that the person whose tax liability is the subject of the investigation can intervene and challenge enforcement if he sees fit. (Emphasis Supplied) (Footnotes omitted).

It is submitted that no material distinction exists between the facts in this case and those present in *Benford, Justice,* and *Bank of Commerce.* Accordingly, the Fifth Circuit's decision is in direct conflict with the decisions of the aforementioned Courts of Appeal, and this Court's mandate in *Reisman v. Caplin,* 375 U.S. 440 (1964), and unless reversed stands to cause an anomalous result.

II

INTERNAL REVENUE SUMMONSES ISSUED IN A CRIMINAL INVESTIGATION FOR THE PRIMARY PURPOSE OF OBTAINING EVIDENCE FOR USE IN A CRIMINAL PROCEEDING ARE INVALID AND UNENFORCEABLE BEING OUTSIDE THE SCOPE OF SETION 7602, INTERNAL REVENUE CODE OF 1954

Discussion of the substantive issue of "improper purpose" may appear premature since the District Court

did not conduct an evidentiary hearing. Nevertheless, the Court of Appeals concluded solely upon the pleadings by which Taxpayer sought to intervene that no "improper purpose" existed to warrant the trial court's refusal to enforce the summonses; therefore the right to intervene had not been established. In light of the Opinion of the Court below, consideration must be given to the meaning of this Court's language in *Reisman v. Caplin,* 375 U.S. 440 (1964) and its reference to the right of judicial review of an administrative summons issued for an "improper purpose" in *United States v. Powell,* 379 U.S. 48, 58 (1964).

A. *The Record In The Instant Case Void Of Any Factual Determination, Requires Resort To An Objective Analysis Of The Merits On the Issue.*

The United States commenced the subject proceeding pursuant to Section 7402(b) and Section 7604(a) of the Internal Revenue Code of 1954 to enforce summonses issued under Section 7602. This section expressly enumerates the purposes for which the Secretary of the Treasury or his delegate is authorized to issue a summons in connection with the Revenue laws and imposes upon the United States the burden of proving that the *purpose* of its conduct and inquiry which prompted issuance and subsequently enforcement of the summonses had an authorized and legitimate end. *"In terms of protection to the individual, a summons submitted to a court for enforcement is at least equivalent to a search warrant." United States v. Roundtree,* — F. 2d — (C.A. 5, 1969). [69-2 USTC 9733] at page 86,066.

The Government has consistently asserted that Section 7602 authorizes the determination of tax liabilities whatever the purpose and whatever the ultimate outcome, but, reported court decisions are not in accord.[14]

In *Hinchcliff v. Clarke,* 371 F. 2d 697 (C.A. 6, 1967), the Court enforced a summons issued by a Special Agent under Section 7602. However, it was made clear that its decision was predicated *solely* on the ground that this was a *civil proceeding* and that the summons was issued *solely* in connection with the civil collection of any income tax *based upon government counsel's representation that the investigation by Internal Revenue Service had no criminal purpose. The Court added further that no evidence so acquired could be used in a criminal prosecution against the taxpayer.*

In the case at bar, the Court below summarized Taxpayer's allegations as follows:

> Appellant contends that since the function of the special agents is to investigate to see whether a crime has been committed no subpoena can be issued under the authority of Section 7602 because of the language of the Reisman opinion *'this would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution,'* citing *Boren v. Tucker, supra.* (A. 48)

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[14] *United States v. Gajewski* — F. 2d — (C.A. 8, 1970) [70-1 USTC 9146]; *Wild v. United States,* 362 F. 2d 206 (C.A. 9, 1966); *Wright v. Detwiler,* 241 F. Supp. 753 (W.D. Pa., 1964), affirmed 345 F. 2d 1012 (C.A. 3, 1964); *McCarry v. Riley,* 363 F. 2d 421 (C.A. 1, 1966), cert. den. 385 U.S. 969 (1966); *In re Magnus, Mabee & Reynard, Inc.,* 311 F. 2d 12 (C.A. 2, 1962), cert. den. 373 U.S. 902 (1963); *Siegel v. Tyson,* 331 F. 2d 604 (C.A. 5, 1964); *Tillotson v. Broughner,* 333 F. 2d 515 (C.A. 7, 1964), cert. den. 379 U.S. 913 (1964).

In the absence of an evidentiary hearing, the Fifth Circuit seemingly substituted the facts presented in *Boren v. Tucker,* 239 F. 2d 767 (C.A. 9, 1956).[15]

1. *The significance of Boren v. Tucker has been diminished.*

Boren v. Tucker does not hold that a summons issued during the course of any investigation by any Internal Revenue Service employee is to be validated by district courts merely upon request. Contrary to the implication drawn by the Court below, it would seem that the citation in *Reisman v. Caplin,* 375 U.S. 440, 449 (1964) of *Boren v. Tucker,* 239 F. 2d 767, 772-773 (C.A. 9, 1956) was not intended to limit defenses but rather merely as an example of *one* improper purpose. The United States has recently conceded the correctness of this proposition.[16]

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[15] "* * * Most significant, it seems to us, is the citation by the Supreme Court in *Reisman* as the basis for its statements relative to criminal prosecutions, of the case of *Boren v. Tucker,* 9 Cir. 239 F. 2d 767. In the *Boren* case the Ninth Circuit enforced the subpoena. In doing so, it distinguished the case of *United States v. O'Connor,* D.C. Mass., 1953, 118 F. Supp. 248. The *Boren* opinion pointed out that in *O'Connor,* an indictment had already been returned against the taxpayer; that there was no other pending investigation; and the special agent was used as a means to cause a subpoena to issue as if the case were still in the investigatory stage. * * *" (A. 49)

[16] Brief for Appellant United States pp. 22-23, *United States v. Monsey,* [69-2 USTC 9703] (S.D. Ind. 1969) on appeal to the Seventh Circuit, Docket No. 18,208, in discussing *Reisman v. Caplin,* 375 U.S. 440, 449 (1964) commented:

> "* * * *The point to be noted is that the Supreme Court* [in citing *Boren v. Tucker*] *obviously was not undertaking a critical evaluation of the criminal-use objection or of any other possible objection,* but was simply saying that, whatever the objection might be, the interested party could wait to assert it in the enforcement proceedings and did not need the prior aid of equity or of a motion to quash.[14] (Footnote omitted) [Emphasis Supplied]

Even if the factual circumstances of the instant case were identical with *Boren,* there is a crucial distinction between *Boren v. Tucker* and this case. Special Agents of the Intelligence Division, under prior regulations,[17] were authorized to *ascertain civil penalties* as well as investigate possible criminal violations. The present regulations[18] governing Special Agents clearly limit their

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[17]21 Fed. Reg. 10418 (December 1, 1956), 1959 CCH Stand. Fed. Tax Rep. ¶5988, p. 57,561:

"1118.6 * * * Intelligence Division. (1) The Intelligence Division investigates alleged criminal violations of the tax statutes, including racketeer and wagering tax cases, but excluding alcohol, tobacco and firearms tax cases. It conducts investigations of applicants who are seeking enrollment to practice before the Treasury Department and of charges against persons enrolled.

(2) The Division evaluates allegations and indications of tax law violations and determines investigations to be undertaken. It makes recommendations as to the disposition of cases investigated, *including recommendations of criminal prosecution, and the assertion of civil penalties.* It provides assistance to U. S. Attorneys and the Regional Counsel in the trial of cases. The Intelligence Division consists of groups of special agents." (Emphasis Supplied)

[18]30 Fed. Reg. 9399-9400 (July 28, 1965), 1966 CCH Stand. Fed. Tax Rep. §5988:

"1118.6 INTELLIGENCE DIVISION.

The Intelligence Division enforces the criminal statutes applicable to income, estate, gift, employment and excise tax laws (except those relating to alcohol, tobacco, narcotics and certain firearms), *by developing information concerning alleged criminal violations thereof,* evaluating allegations and indications of such violations to determine investigations to be undertaken, *investigating suspected criminal violations of such laws, recommending prosecution when warranted,* and measuring effectiveness of the investigation and prosecution processes. The Division assists other Intelligence offices in special inquiries, drives and compliance programs and in the normal enforcement programs, including those combating organized wagering, racketeering and other illegal activity, by providing investigative resources upon regional or National Office request. It also assists U. S. Attorneys and Regional Counsel in the processing of Intelligence cases, including the preparation for and trial of cases." (Emphasis Supplied)

functions to *ascertaining whether or not a criminal violation of law has occurred* and to assisting in prosecutions.

Whatever doubts may have existed as to whether a Special Agent's duties involve criminal, civil or administrative implications seem to have been resolved by either this Court's decision in *Mathis v. United States,* 391 U.S. 1 (1968) or, through administrative promogation.[19] The principle of *Mathis,* as it relates here, is that a tax investigation can be a criminal investigation.

In consideration of the foregoing, it was unrealistic to hold, as the Court below did, that a Special Agent's function may be ignored because a criminal prosecution was not *in esse.* Concededly, one may not ultimately result; however, that is true with respect to any investigation undertaken by any policeman. Although a criminal investigation may simultaneously disclose civil liability, that does not make such an investigation any the less one with dominant criminal overtones. Where, as here, it appears that the primary purpose of determining tax lia-

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[19] Memorandum for the United States in Opposition, p. 4, *White v. United States,* Sup. Ct. No. 898, October Term 1969:

> [T]he present policy of the Internal Revenue Service is to give virtually full *Miranda warnings* to all taxpayers when they are first interviewed by a Special Agent,[2] • • •

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[2] By news release dated November 26, 1968, the Internal Revenue Service announced that henceforth a special agent on his first visit to a taxpayer must warn him of his constitutional rights, including the right to counsel, but not including the proffer of legal aid unless the taxpayer is in custody. The news release notes that this 'new procedure goes beyond most legal requirements that are designed to advise persons of their rights.' 1968 CCH Fed. Tax Reporter, par. 6946; 1968 Prentice-Hall Fed. Taxes, par. 55,476.

bility is for use in a criminal proceeding,[20] the summons is without the purview of Section 7602.

2. *Determination of the primary purpose for which a Summons is issued is mandatory.*

In the past it has been the Government's consistent position that only if the taxpayer could establish that the *sole* purpose of a Special Agent conducting a tax investigation was the obtaining of evidence for use in a criminal proceeding would it be improper for a summons under Section 7602 to be issued. The Government's logic then concluded that since the Special Agent is never certain that his investigation will result in a criminal prosecution, and further, since the civil aspects of the case are always pursued at the conclusion of the criminal case, these factors demonstrate that the Special Agent's investigation is not conducted *solely* for the purpose of obtaining evidence for use in a criminal proceeding. The Taxpayer submits that both the premise and conclusion are erroneous.

It is well settled that if the purpose for the issuance of the summons was to obtain evidence for use in a criminal proceeding, this on its face, is an improper use of the summons power. *Wild v. United States,* 362 F. 2d 206 (C.A. 9, 1966).

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[20]*United States v. Mothe,* 303 F. Supp. 1366, 1368 (E.D. La., 1969), on appeal to the Fifth Circuit Docket No. 28,640, involving one of the same Special Agents and Taxpayer as part of the investigation presently under review by this Court.

> "However, Special Agent Miller repeatedly testified that a major part of his job is to determine civil tax liability (Transcript, pages 8-9, 31, 32-33, 35-36), although he admitted that his primary purpose in determining tax liability is to use it as a foundation in a criminal case. (Transcript, p. 31.) * * *"

The Taxpayer submits that the only appropriate test to be applied is not whether the *sole* purpose for the issuance of the summons was the obtaining of evidence for use in a criminal proceeding,[21] but rather whether this was the *principal* or *primary* purpose. If the sole purpose test is utilized, it could be avoided simply by adding a corollary purpose of relative insignificance. Since the presence of such an insignificant secondary purpose could be completely within the Government's control, any test other than the principal purpose test would be meaningless and easily circumvented.

The Fifth Circuit Court's conclusion that when the summonses were issued, the Special Agent was not yet convinced that a crime had been committed, and therefore, the issuance of the summonses was not for the purpose of obtaining evidence for use in a prosecution *in esse,* is similar to that raised in *Camara v. Municipal Court,* 387 U.S. 523 (1967) and *See v. City of Seattle,* 387 U.S. 541 (1967). In rejecting these arguments this Court stated in *Camara,* at p. 530-531:

> "* * * It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.[6] For instance, even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official

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[21] *United States v. Ruggeiro,* 300 F. Supp. 968, 975 (C.D. Calif. 1969). (On appeal to the Ninth Circuit, Docket Nos. 24519 to 24524, inclusive):

> "To say that a summons is not being used for an improper purpose unless the existence of a proper civil purpose is absent, *United States v. DeGrosa,* 3rd Cir. 1969, * * * 405 F. 2d 926, simply begs the question. All criminal tax investigations to be prosecutable require the 'proper civil purpose' of determination of tax liability. Simply stated no tax due — no tax fraud."

> authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security. * * * " (footnote omitted).

The Government cannot seriously urge that this Court was required to determine whether the housing inspector in *Camara,* and the fire inspector in *See,* were solely seeking evidence for use in a criminal proceeding. This is simply not determinative of when or whether a search warrant is required prior to an involuntary search. The Court stated in *Camara* at p. 531: "Like most regulatory laws, fire, health, and housing codes are enforced by criminal processes." This fact, the Court reasoned required that the safeguards of the warrant procedures must be followed.

It follows in light of these pronouncements that the archaic and deceptive "sole purpose test" as stated in the cases so heavily relied upon by the Government in the past, has now been thoroughly discredited and is no longer persuasive.

3. *There has been a shift in judicial interpretation as to when an examination evolves from the investigatory to accusatory status.*

As indicated above, this Court in *Mathis v. United States,* 391 U.S. 1, 4 (1968) dealing with the necessity of "Miranda Warnings" in a tax investigation by Internal Revenue Agents, considered the argument advanced by the Government that a routine tax investigation was outside the scope of Miranda. The government sought to escape the application of *Miranda v. Arizona,* 384 U.S. 436 (1966) partially on the basis "that these questions

were asked as part of a routine tax investigation *where no criminal proceedings might even be brought*". (391 U.S. at p. 4) (Emphasis Supplied). This Court responded stating:

> * * * These differences are too minor and shadowy to justify a departure from the well considered conclusions of Miranda * * * (391 U.S. at p. 4)

A substantially identical argument is continually advanced by the government in summons enforcement proceedings.

B. *When An Investigation Conducted By Special Agents Of The Internal Revenue Service Has In Truth And Fact Turned From The Investigatory Stage To One Of An Accusatory Nature It Is Clearly Without The Scope Of Congressional Intent, In Authorizing The Use Of Administrative Summonses.*

The thrust of Taxpayer's argument in this case is *not* a failure on the part of the government to comply with the requirements of *Miranda v. Arizona,* 384 U.S. 436 (1966). But, if the investigation by a Special Agent is criminal enough in nature to require the "Miranda" protections,[22] then *a fortiori,* any summons issued under these particular circumstances is issued for the primary purpose of gathering evidence for a criminal prosecution; and, thus outside the scope of Section 7602 of the Internal Revenue Code of 1954. In addition, a summons issued to an individual taxpayer can be challenged by him based on his Fourth and Fifth Amendment rights.

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[22] Judicially in *Mathis v. United States,* 391 U.S. 1 (1968), *United States v. Dickerson,* 413 F. 2d 1111 (C.A. 7, 1969) and administratively I.R. — 949, November 26, 1968, 1968 CCH Fed. Tax Reporter, par. 6946, Memorandum in Opposition for United States, p. 4, *White v. United States,* Sup. Ct. No. 898, October Term 1969.

> * * * If * * * the inquiry is 'no longer solely a civil investigation', but ha[s] reached the stage of an investigation into possible criminal violations — 'an inquiry with dominant criminal overtones' — he is entitled to raise his fifth amendment objections. *Stuart v. United States,* 5 Cir. Sept. 17, 1969, No. 27,093 [69-2 USTC ¶9630] F. 2d. * * *
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> *United States v. Roundtree,* — F. 2d — (C.A. 5, 1969) [69-2 USTC 9733] at page 86,068.

Similarly, a corporation may challenge a summons issued to it for its own books and records as violative of Fourth Amendment rights.[23]

In *United States v. Dickerson,* 413 F. 2d 1111 (C.A. 7, 1969), a Revenue Agent assigned to audit the defendant, found he had failed to file certain income tax returns. Suspecting that a criminal violation had been committed, he suspended his examination and referred the case to the Intelligence Division. Subsequently the case was assigned to a Special Agent. The Revenue Agent was then reassigned to assist him.[24] The United States categorized this factual pattern as follows:

> All that is shown here is that the *routine audit begun by Internal Revenue became a criminal investigation,* and that the defendant was never so advised.[25] (Emphasis Supplied)

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[23] Perhaps one of the most recent and exhaustive analysis of the extent to which a summons issued to a corporation for its books and records is protected by the Fourth Amendment guarantees against unreasonable searches and seizures can be found in the Proceedings of the Twenty-ninth Annual Judicial Conference of the Sixth Circuit which appears at 45 FRD 293, 323, 327-8 (1968) Constitutional Rights in Criminal Tax Investigations by Paul P. Lipton.

[24] Brief for Appellant United States, p. 3, *United States v. Dickerson,* 413 F. 2d 1111 (C.A. 7, 1969)

[25] Brief for Appellant United States, p. 14, *United States v. Dickerson,* 413 F. 2d 1111 (C.A. 7, 1969)

The Court in *United States v. Dickerson,* 413 F. 2d 1111, 1115 (C.A. 7, 1969) stated:

> A line of cases originating between the *Escobedo* and *Miranda* decisions, notably *Kohatsu v. United States,* 351 F. 2d 898 (9th Cir. 1965), reasons that because the IRS agents cannot determine whether a crime has in fact been committed until their investigation is complete, the adversary process has not sufficiently 'focused' on the suspect as to require that warnings be given. But as Judge Will observed in his persuasive opinion in *United States v. Turzynski,* * * * 268 F. Supp. 847, 852-853 (N.D. Ill. E.D. 1967):
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> > 'This distinction between a criminal tax investigation where the taxpayer is suspected of a tax fraud not yet fully identified and a criminal investigation where a known violation of the law is attempted to be linked to a particular suspect is logically irrelevant for purposes of determining when the adversary process has begun, *i.e.,* when the investigatory machinery of the government is directed toward the ultimate conviction of a particular individual, and when, therefore, a suspect should be advised of his rights. What matter if the culprit is known before the crime or the crime before the culprit. In either case the investigator is attempting to develop evidence for the purpose of criminal prosecution and conviction.' * * *

A Taxpayer being an accused, any attempt, at this point to distinguish a criminal tax investigation from other criminal inquiries is a distinction without a difference.

III

AN INTERVENING TAXPAYER IS ENTITLED TO A FULL ADVERSARY HEARING IN CHALLENGING ENFORCEMENT OF ADMINISTRATIVE SUMMONSES BY THE INTERNAL REVENUE SERVICE

The final issue involves the propriety of the Court of Appeals affirming the trial court's action in enforcing the administrative Summonses without holding an evidentiary hearing.

It has been firmly established that both the party summoned and an intervening taxpayer must be accorded a meaningful adversary hearing before a district court may enforce a summons. *Reisman v. Caplin,* 375 U.S. 440 (1964); *United States v. Powell,* 379 U.S. 48, 58 (1964).

> * * * This does not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered. At the hearing, he 'may challenge the summons on any appropriate ground,' *Reisman v. Caplin,* 375 U.S. 440, at 449, 84 S. Ct. at 513. Nor does our reading of the statutes mean that under no circumstances may the court inquire into the underlying reasons for the examination. It is the Court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. The burden of showing an abuse of the Court's process is on the taxpayer, * * * (379 U.S. at 58)

The tenor of the *Powell* decision is that "the parties must be given a full opportunity in an adversary hearing to present their case." *Venn v. United States,* 400 F. 2d 207, 212, n. 12 (C.A. 5, 1968). See also, *United States v. Benford,* 406 F. 2d 1192, 1194 (C.A. 7, 1969); *D. I. Operating Co. v. United States,* 321 F. 2d 586 (C.A. 9, 1963). Clearly the lower Courts did not accord the Taxpayer any of these rights when as occurred during the proceedings at the trial level argument was limited to the Taxpayer's Motion to Intervene

The Fifth Circuit in precluding intervention denied the Taxpayer an adversary hearing, a right it subsequently recognized in *United States v. Roundtree,* — F. 2d — (C.A. 5, 1969) [69-2 USTC 9733] at page 86,068:

> A proceeding to enforce a summons in an adversary proceeding, *Reisman v. Caplin,* 1964, [64-1 USTC ¶ 9202] 375 U.S. 440, 446, 84 S. Ct. 508, 11 L. Ed. 2d 459; *Dunn v. Ross,* 5 Cir. 1966, [66-1 USTC ¶ 9238] 356 F. 2d 664, 667. In the absence of other statutory directions, the Federal Rules of Civil Procedure apply. Fed. R. Civil P. 81(a)(3); *Powell,* 379 U.S. at 58 n. 18; *United States v. McKay,* 5 Cir. 1967, [67-1 USTC ¶ 12,449] 372 F. 2d 174. We have construed the thrust of this determination to be that 'the parties must be given a full opportunity in an adversary hearing to present their case'. *Venn,* 400 F. 2d 212 n. 12.

The trial court took no testimony, nor did it permit the Taxpayer to submit evidence or cross-examine Government witnesses in an effort to attack its pleadings and affidavits. Under these circumstances, the Taxpayer was not afforded the adversary proceeding prescribed by this Court in *Reisman* and *Powell,* nor by the Fifth Circuit itself:

> "... [I]t hardly comports with good administration, if not due process, to determine the merits of a claim asserted in a pleading seeking an adjudication through an adversary hearing by denying access to the court at all. *Atlantis Development Corporation v. United States,* 379 F. 2d 818, 827 (C.A. 5, 1967) * * * "

The Taxpayer, of course, recognizes if there is no genuine issue as to any material fact, the Government may move for summary judgment. If there were no issues of fact requiring a hearing in the instant case, as the Government belatedly contends, it should have moved for summary judgment in the District Court. This would have given the Taxpayer an opportunity to file opposing affidavits and to take other steps to protect his interests. The Taxpayer's challenges to the Summonses should not be decided on the present record, void as it stands.

In *United States v. Powell,* 379 U.S. 48 (1964), the Solicitor General submitted that an action to enforce Internal Revenue Summonses is an adversary proceeding requiring an evidentiary hearing.[26] Presently, the Government belies itself and inconsistently asserts that a summary procedure is appropriate and that the party summoned must "show cause" that there has been an abuse of the summons power before there need be an adversary hearing.

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[26] *Reisman v. Caplin,* 375 U.S. 440, 446. Brief for Petitioner United States, *United States v. Powell,* p. 10-11, Sup. Ct. No. 54, Oct. Term 1964:

> To enable the Commissioner to carry out effectively his investigatory duties, federal courts are vested with jurisdiction to compel compliance with a summons 'by appropriate process' (Secs. 7402(b), 7604(a)). The normal procedure, as here, is an application by the Commissioner for an order to show cause why the person summoned should not be ordered to comply. There results 'an adversary proceeding affording a judicial determination of the challenges to the summons.'

A. *Summons Enforcement Proceedings Are Governed By The Federal Rules of Civil Procedure 81(a)(3).*

Attention must first be directed to the question of whether, and if so, in what manner, the Federal Rules of Civil Procedure, and particularly Part V, Depositions and Discovery Rules 26 thru 37, apply to the proceedings to enforce an Internal Revenue Summons.

In *Falsone v. United States,* 205 F. 2d 734, 742, (C.A. 5, 1953), cert. den., 346 U.S. 864, (1953), the Court commenting on this particular point, stated:

> * * * Rule 81(a)(3) makes the Rules of Civil Procedure applicable to 'proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States . . .'. That means that the rules are applicable to the court action to enforce the summons under 26 USCA Section 3633 (a)." [To the same effect under the Internal Revenue Code of 1954, 26 USC 7402(b)]

Thus, it is clear, that the Federal Rules of Civil Procedure are designed to apply to actions to enforce an Internal Revenue Summons.[27] In the absence of a showing by the Government of an extremely compelling need to eliminate the application of Federal Rules of Civil Procedure, and particularly those relating to discovery, the Rules should apply to enforcement proceedings. Those Rules are intended for the convenience of the Court and for the protection of litigants; they provide an or-

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[27] *United States v. Powell,* 379 U.S. 48, (1964); *United States v. Bank of Commerce,* 405 F. 2d 931, (C.A. 3, 1969); *United States v. Moriarty,* 278 F. Supp. 187, (E.D. Wis., 1967); *Kennedy v. Rubin,* 254 F. Supp. 190, (N.D. Ill., 1966); *Venn v. United States,* 400 F. 2d 207 (C.A. 5, 1968).

derly enlightened mode of procedure for litigation. In *United States v. Proctor & Gamble Company,* 356 U.S. 677, (1958), this Court pointed out why it is imperative that the discovery rules apply to civil cases:

> * * * Modern instruments of discovery serve a useful purpose, as we noted in *Hickman v. Taylor,* 329 U.S. 495. They together with pretrial procedures make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent. *Id.,* 329 U.S. at 501. Only strong public policies weigh against disclosure. * * *

Reaffirming prior edicts construing the discovery devices sanctioned by Part V of the Federal Rules of Civil Procedure, this Court in *Schlagenhauf v. Holder,* 379 U.S. 104, (1964) embarking upon a discussion preliminary to the applicability of Rule 35 stated:

> * * * We enter upon determination of this construction with the basic premise 'that the deposition-discovery rules are to be accorded a broad and liberal treatment,' *Hickman v. Taylor, supra,* at 507, to effectuate their purpose that 'civil trials in the federal courts no longer need to be carried on in the dark.' *Id.,* at 501.

The propositions advanced by the Government against Taxpayer's discovery could be made in any law suit. This would, of course, defeat the purpose for which the Rules were promulgated, being to lessen the burden placed upon the courts, through an attempt to sift the relevant and material facts, the foundation for which are initially unknown.

1. *The right to a full hearing is a meaningless formality without the concomitant right to discovery of facts supporting defenses.*

In the case of *United States v. Powell,* 379 U.S. 48, 58, (1964), this Court held that this adversary hearing is not a meangingless formality. An adversary hearing is not a summary hearing. Indeed, to any lawyer steeped in the traditions of Anglo-American common and constitutional law, both terms are mutually exclusive. The United States Court of Appeals for the Seventh Circuit recently pronounced a standard in summons enforcement cases in *United States v. Benford:*

> The rule that the taxpayer may intervene and is entitled to an adversary hearing before enforcement is ordered does not, in our opinion, extend *carte blanche* to obstruct and delay the enforcement proceeding. Rule 81(a)(3) F. R. Civ. P. contemplates that in any particular enforcement proceeding the court may modify or limit the applicability of the federal rules.[8] Mr. Mackey has called our attention to district court decisions holding that a respondent in an enforcement proceeding is entitled to conduct pretrial discovery.[9] Both of those decisions recognized that under Rule 81(a)(3) there would be cases where it would not be an abuse of discretion to bar discovery, and both recognized that the court could limit the scope of and time for taking depositions. The standard, as we see it, is that taxpayer must be afforded a meaningful adversary hearing of legitimate challenges. (406 F. 2d 1191, 1194 (C.A. 7, 1969)

This position has received affirmance from the Third Circuit Court of Appeals in the recent case of *United*

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[8]See 1946 Committee Note, 7 Moore's Federal Practice p. 4413.
[9]*Kennedy v. Rubin* (N.D. Ill., 1966), 254 F. Supp. 190; *United States v. Moriarty* (E.D. Wis. 1967), 278 F. Supp. 187.

States v. Bank of Commerce, 405 F. 2d 931, (C.A. 3, 1969). Taxpayer does not request nor desire to undertake an indiscriminate searching into the Government files,[28] but anticipates that discovery be limited to the scope enunciated and approved by the United States Court of Appeals for the Seventh Circuit in *United States v. Benford,* 406 F. 2d 1191 (C.A. 7, 1969).

2. *Documents such as Internal Revenue Manuals and job descriptions are vital to Taxpayer's defenses.*

These documents are not merely relevant to the issues in enforcement proceedings in some inferential manner but indubitably contain admissible direct evidence upon each of the critical issues recognized by this Court in *Reisman v. Caplin.* The relevancy of Internal Revenue Service Manuals of Instruction, under a Rule 34 Motion for Production was recognized by the Court in *United States v. Moriarty* [69-1 USTC 9169], (E.D. Wis. 1968).[29]

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[28] Compare *United States v. Howard,* 360 F. 2d 373, 381, (C.A. 3, 1966) ". . . An examination of the interrogatories filed by Howard demonstrates their extreme broadness and their lack of utility save as an harassment to the United States."

[29] *United States v. Moriarty,* at page 83,793:

"In reaching this conclusion we have addressed ourselves to three salient questions. The first of these is whether the manuals are relevant to the subject matter involved in the action pending here and whether their production appears reasonably calculated to lead to the discovery of admissible evidence. Bearing in mind the legal authority of *Boren v. Tucker,* [57-1 USTC ¶9246] 239 F. 2d 767 (9th Cir. 1936) and *Reisman v. Caplin* [64-1 USTC ¶9202] 375 U.S. 440 (1964), we find that these criteria of relevance and fruitfulness are satisfied here. In our judgment it is reasonable to expect that the manuals will be relevant and that their production is reasonably calculated to lead to a clarification of whether the administrative summons at issue here was served for the possibly improper purpose of obtaining evidence merely for use in a criminal prosecution * * *" (Footnote omitted)

In further support of the right of discovery through production of documents, this Court's attention is invited to the recent summons enforcement proceeding in *United States v. Monsey,* [69-2 USTC 9703] (S.D. Ind. 1969) on appeal (C.A. 7, 1970) Docket No. 18,208, in which the District Court ordered inspection and copying of documents similar to those Taxpayer would have sought in the District Court upon gaining party-litigant status. Any refusal or denial to produce the documents sought, for all practical purposes, erects an impenetrable barrier to discovery of evidence relevant to the crucial issues previously discussed and effectuates a suppression of material evidence.

To Taxpayer's knowledge, in no case has claim of privilege been asserted by the Government. Consequently, since there is no known privilege or public policy permitting the Government to withhold vital evidence and documents, any failure to produce is without meritorious standing. *United States v. Reynolds,* 345 U.S. 1 (1953) and *United States v. Moriarity,* [69-1 USTC 9169] (E.D. Wis., 1968). The evidence in the requested documents is not available to a taxpayer from any other source and represents the best and only reliable evidence of the purposes and motives of the Government in directing and pursuing the Summonses.

B. *There Is No Valid Reason For Postponing Adjudication Of Taxpayer's Objections To Enforcement Of The Summonses Until After Criminal Indictment.*

An evidentiary hearing contemplates a showing of the legitimate purpose of the summons, the necessity of the records and testimony sought and that such information

has not been previously procured. To relegate the question of "improper purpose" to a subsequent motion to suppress during or prior to a criminal trial is generally unsatisfactory to both a defendant and the Government.

As Chief Judge Lumbard stated in his concurring opinion in *In re Magnus Mabee & Reynard, Inc.*, 311 F. 2d 12, 18 (C.A. 2, 1962):

> * * * But if the person summoned chooses not to contest enforcement, a taxpayer's rights in a pending criminal action might go unprotected unless he is permitted to assert them in the enforcement proceedings. The rules of standing are not so rigid that a court whose authority is sought in aid of a summons must keep its doors closed to the taxpayer in such situation. Neither the taxpayer nor the government would be well served by postponing until trial a hearing of the claim that pre-trial discovery violated the Federal Rules of Criminal Procedure; at that stage it might be very difficult to unravel properly obtained evidence from that which, directly or indirectly, was obtained by allegedly unauthorized means. * * *

It is apparent that the District Court did not even entertain the possibility of an evidentiary hearing. Thus, there was no discretionary denial but a total misconception of the nature of an enforcement action.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the cause remanded to the United States District Court, Middle District of Florida, Tampa Division, with instructions to grant intervention and a full evidentiary hearing on the issues raised in the pleadings.

Respectfully submitted,

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Dated: April, 1970

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C., 1964 ed.):

SECTION 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized —

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SECTION 7604. ENFORCEMENT OF SUMMONS.

(a) Jurisdiction of district court. — If any person is summoned under the internal revenue laws to ap-

pear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

28 U.S.C., 1964 ed. Civ. Proc. R.:

Rule 24(a)(2) Federal Rules of Civil Procedure (1966):

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action:

* * *

(2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 81(a)(3) Federal Rules of Civil Procedure (1968):

(a) TO WHAT PROCEEDINGS APPLICABLE.

* * *

(3) In proceedings under Title 9, USC, relating to arbitration, or under the Act of May 20, 1926, ch 347, §9 (44 Stat 585), USC, Title 45 §159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 942

KEVIN L. DONALDSON, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINION BELOW

The opinion of the court of appeals (A. 42–52) is reported at 418 F. 2d 1213.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1969 (A. 53). The petition for a writ of certiorari was filed on December 11, 1969, and was granted on February 27, 1970 (397 U.S. 933). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a taxpayer may intervene of right in a proceeding to enforce an internal revenue summons directed to a third party, where he asserts no privilege

or proprietary interest in the material sought and seeks only to attack the purpose of the summons.

2. If the foregoing question is answered in the affirmative, the further question is raised whether an internal revenue summons may properly be used in aid of an administrative determination whether to recommend a criminal prosecution.

STATUTES, RULES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 6653, 6659, 7402, 7602, 7604 and 7801 of the Internal Revenue Code of 1954, Rules 24 and 81 of the Federal Rules of Civil Procedure and Section 301.7602–1 of the Treasury Regulations are set forth in the Appendix, *infra*, pp. 41–46.

STATEMENT

On November 25, 1968, respondents (the United States and John P. Grady, a Special Agent of the Internal Revenue Service) filed two petitions in the United States District Court for the Middle District of Florida, asking that the court enforce two internal revenue summonses relating to the tax liabilities of petitioner for the years 1964, 1965, 1966 and 1967 (A. 1–5). Each summons called for the production of records of the Acme Circus Operating Company, Inc., doing business as Clyde Beatty-Cole Circus, relating to its employment, compensation and reimbursement of the present petitioner during the years 1964 through 1967 (A. 9–11).[1] The summonses were directed to Acme

[1] We agree with petitioner's statement (Br. 3) that the two summonses present identical questions and that the record on the summons issued to Joseph J. Mercurio adequately presents the issues on both summonses and petitions.

and to Joseph J. Mercurio, directing them to appear before Special Agent Grady on September 23 and 24, 1968 (A. 9). On September 13, the district court, in proceedings prior to and separate from the present ones, enjoined Acme and Mercurio from complying with the summonses until ordered to do so by a court of competent jurisdiction (A. 27–30). The only parties to those injunction actions were petitioner and the witnesses.

The petitions for enforcement of the summonses were supported by affidavits of Special Agent Grady and of Special Agent Bruce B. Miller,[2] alleging that the summonses were issued to obtain information relating to petitioner's financial transactions with the Acme Circus Operating Company, in furtherance of an investigation into petitioner's correct income tax liability for the years 1964 through 1967, inclusive (A. 6–7, 12–15). In response to orders to show cause issued by the district court (A. 16), both witnesses indicated no objection to compliance, stating that they would previously have complied with the summonses were it not for the injunctions against them. (A. 25–26).

On December 9, 1968, petitioner, relying on Rule 24(a)(2) of the Federal Rules of Civil Procedure, moved to intervene in the enforcement procedings, alleging that it was his tax liability which was under investigation, and further alleging as follows (A. 17–18):

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[2] The agents were employed by the intelligence divisions of the Tampa, Florida, and New Orleans district offices, respectively, of the Internal Revenue Service.

> 2. Kevin L. Donaldson, the Intervenor, has an interest relating to the transactions which are the subject of this action and is so situated that the disposition of this action may, as a practical matter, impair or impede his ability to protect that interest unless the Intervenor's interest is adequately represented by existing parties, in that a judgment of this Court may adversely and prejudicially effect [sic] the substantial rights and privileges secured to him by the Constitution of the United States, as will more definitely appear from the Intervenor's proposed Answer, a copy of which is attached hereto.

Petitioner's proposed answers to the petitions alleged, *inter alia,* that the special agents were guilty of bad faith in asserting that their investigation was for the purpose of ascertaining petitioner's correct income tax liability; that the agents were investigating petitioner "for the express and sole purpose of obtaining evidence concerning any violations of the criminal statutes applicable to the tax laws of the United States"; and that, therefore, the summonses were not issued for any purpose enumerated in Section 7602 of the Internal Revenue Code of 1954 and could not be enforced under Sections 7402(b) and 7604(a) (A. 21–22).

Additional defenses raised in the proposed answers asserted that the summonses were too sweeping and failed to demonstrate relevancy to petitioner's correct tax liability, that Special Agents Grady and Miller had no personal knowledge of the records or testimony required in the summonses, and that the sum-

monses violated petitioner's rights to be free of unreasonable search and seizure and from giving testimony tending to incriminate him (A. 22–23). Petitioner does not, however, raise in this court the validity of these defenses or his right to raise them by intervention.

The United States opposed petitioner's motions to intervene on the grounds, among others, that petitioner had no legal, equitable, possessory, or other interest in the records that would give him standing to object to enforcement of the summonses, and that the intervention would unduly delay and encumber expeditious adjudication of the rights of the original parties to the enforcement actions (A. 31–32). The district court denied the motions to intervene (A. 33) and petitioner appealed from the denial. The district court further issued orders, dated January 16, 1969, enforcing the summonses (A. 34–36), but stayed them pending petitioner's appeal (A. 38). The court of appeals affirmed the orders enforcing the summonses on October 30, 1969 (A. 53), but has continued the stays pending this Court's decision.

ARGUMENT

INTRODUCTION AND SUMMARY

In substance, petitioner's contention in this case is that he has a right to prevent the Internal Revenue Service from questioning third parties—with whom he has no relationship of privilege and who have no potential evidence in which he has any claim of proprietary interest—about their knowledge of matters

pertinent to his tax liabilities. The only reason he asserts for thus hampering the tax investigation is that it may lead to a recommendation of criminal prosecution; this possibility, he argues, deprives the Service of statutory authority to use the administrative summons procedures established under the Internal Revenue Code "[f]or the purpose of ascertaining the correctness of any return [or] * * * determining the liability of any person for any internal revenue tax * * *" (26 U.S.C. 7602).

The courts below properly rejected petitioner's attempt to intervene in the proceedings for enforcement of the summonses seeking records of his employment and compensation during the years under investigation for two reasons: first, because the absence of any asserted privilege or proprietary interest deprives petitioner of any standing to intervene in the enforcement proceedings; and, second, because in any event the fact of an ultimate criminal purpose would not bar enforcement of a summons in the posture of the present investigation.

A.

Whether one views the right of intervention as governed by Rule 24(a)(2) of the Federal Rules of Civil Procedure or independently by this Court's language in *Reisman* v. *Caplin*, 375 U.S. 440, the same criteria apply to determine whether a taxpayer's "interests" are sufficient to warrant intervention. Both Rule 24(a)(2), when read together with Rule 81(a)(3), and *Reisman* embrace sufficiently flexible standards to permit this Court to fashion intervention guidelines which take into account both the legitimate interests

of the taxpayer and the need for effective and expeditious enforcement of the internal revenue laws.

Where a taxpayer asserts a claim based on a proprietary interest in the evidence sought through the enforcement of a summons or a claim that the evidence sought embodies privileged communications, failure to allow intervention in enforcement proceedings may well, in the language of Rule 24(a)(2), "impair or impede his ability to protect" those legally cognizable interests. But a taxpayer's simple "interest" in not having the government investigate his tax liabilities or whether he has been guilty of tax fraud—when there is no claim of direct intrusion upon any of his personal rights—is, in the language of the Rule, not an "interest relating to the property or transaction which is the subject of the [enforcement] action * * *." Any valid objection that petitioner might have to the tax investigation may be asserted if and when the investigation results in proceedings against him. Accordingly, there is no reason for allowing a taxpayer in petitioner's position to litigate anticipatorily the propriety of the investigation and summonses issued in furtherance thereof. Allowance of intervention for this purpose results in unnecessary protraction of summons enforcement proceedings, with delays highly prejudicial to the valid governmental interest in effective administration of the tax laws.

B.

Even if the Court should disagree with our position that petitioner has no basis for intervention, in any event

the decision below should be affirmed because there is no impropriety in the use of internal revenue summonses in investigations like the present one involving petitioner. Petitioner's substantive objection to the summonses is based solely upon a proposition of law—that the statute does not permit an internal revenue summons to be used when its "primary purpose" is to aid the Internal Revenue Service in determining whether or not it should recommend that the Department of Justice prosecute a taxpayer under the tax laws. The tax laws, however, make any such distillation of the "purpose" of an investigation impossible and irrelevant, since the existence of liability is obviously crucial to a criminal prosecution as well as civil proceedings and fraud is a factor in the amount of liability as well as a possible basis for criminal action. The organization of the Internal Revenue Service—which we shall describe in some detail—necessarily reflects this interrelationship between civil and criminal factors, and an investigation of a taxpayer suspected of fraud often involves both the intelligence division and the regular audit division. Thus, in practice there is no such thing as an investigation having a "primary" criminal purpose; indeed, in 1969 only slightly over one-half of the full-scale investigations completed by intelligence divisions produced recommendations to prosecute, and the others uncovered large deficiencies and penalties to be collected civilly. Any decision to recommend prosecu-

tion is not made until after a special agent of an intelligence division completes his report—that is, until well after the stage at which the investigation of petitioner now is. Thus, this case does not involve the question whether a summons may be used specifically to obtain evidence for a prosecution that is under way.

The language and the legislative history of Section 7602 reflect these realities of tax administration, and offer no support for petitioner's attempt to make an artificial distinction between "civil" and "criminal" purposes. Rather, it is clear, not only from the language of the present section but also from the language and history of the predecessor sections that it carries forward without substantive change, that Congress directly contemplated that the summons procedures would be used in investigations into "false or fraudulent" returns looking toward possible criminal prosecutions. And, in that context, the dictum in *Reisman* v. *Caplin,* 375 U.S. 440, upon which petitioner heavily relies, is consistent with such an interpretation of the statute, as numerous decisions by the courts of appeals since *Reisman* agree. Accordingly, there is no sound basis for petitioner's contention that, in effect, the Internal Revenue Service must either forswear any ultimate criminal prosecution when fraud is suspected or else relinquish the indispensible investigatory tools that Congress has provided for the general administration of the tax laws.

I. A TAXPAYER MAY NOT INTERVENE IN AN INTERNAL REVENUE SUMMONS ENFORCEMENT PROCEEDING UNLESS HE ASSERTS A PROPRIETARY INTEREST IN THE MATERIAL SOUGHT OR A PRIVILEGE AGAINST ITS DISCLOSURE

A. THE RIGHT TO INTERVENE MUST BE DETERMINED BY CONSIDERING THE FACTORS ESPECIALLY APPLICABLE TO INTERNAL REVENUE SERVICE INVESTIGATIONS

Petitioner argues that his evident concern with the outcome of the tax investigation that gave rise to the summonses to Acme and Mercurio constitutes, under the literal language of Rule 24(a)(2) of the Federal Rules of Civil Procedure, such an "interest relating to the property or transaction which is the subject of the [enforcement] action" that its potential "impairment" "as a practical matter" if the summonses are enforced gives him an automatic right to intervene.[3] That Rule, he further contends, applies in full force because of this Court's statement in *United States* v. *Powell*, 379 U.S. 48, 58, n. 18,[4] that

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[3] Petitioner based his motion to intervene on Rule 24(a)(2) (A. 17), but as noted by the court of appeals, relied solely on *Reisman* v. *Caplin*, 375 U.S. 440, on oral argument below (A. 45–46).

[4] The applicability of the Federal Rules of Civil Procedure was not directly made an issue in the *Powell* briefs, although taxpayer's brief (pp. 21–22) cited *Martin* v. *Chandis Securities Co.*, 128 F. 2d 731 (C.A. 9), which held only that it was a matter of no consequence for the government to style its application for enforcement of an internal revenue summons as a "petition" rather than a "complaint" and involved no other aspect of the Federal Rules of Civil Procedure. In addition, the *Powell* briefs did not call attention to the fact that *Martin* v. *Chandis Securities Co.*, *supra*, was decided prior to the 1946 amendments to Rule 81(a)(3), which introduced the current

> [b]ecause § 7604(a) contains no provision specifying the procedure to be followed in invoking the court's jurisdiction, the Federal Rules of Civil Procedure apply, *Martin* v. *Chandis Securities Co.*, 128 F. 2d 731. The proceedings are instituted by filing a complaint, followed by answer and hearing. * * *

Petitioner alternatively asserts that, aside from the mandate of Rule 24(a)(2), language used in this Court's decision in *Reisman* v. *Caplin*, 375 U.S. 440, which made no reference to the Federal Rules of Civil Procedure, specifically authorizes a taxpayer to intervene to challenge the validity of a summons issued to a third party on the ground that the investigation has an improper purpose.

Reisman held that a taxpayer's attorney, in a suit brought against the Commissioner and the taxpayer's accountants, was not entitled to an injunction restraining compliance with a summons requiring the accountants to produce a quantity of records, attorney's workpapers, and audit reports. The Court found that the taxpayer and the attorney had an adequate remedy in their right to appear or intervene and assert their objections both before the investigating agent and before the district court in the event the government brought an action to enforce the summons. In passages which have given rise to much conflict among the circuits, the opinion went on as follows (375 U.S. at 445, 449):

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express provision that, while the Rules would apply to administrative summons enforcement proceedings, their application could be curtailed by a rule or an order of the district court.

> [T]he Government concedes that a witness or any interested party may attack the summons before the hearing officer. There are cases among the circuits which hold that both parties summoned and those *affected by* a disclosure may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims. * * * We agree with that view and see no reason why the same rule would not apply before the hearing officer. * * *
>
> * * * * *
>
> Furthermore, we hold that in any of these proceedings before either the district judge or United States Commissioner, the *witness* may challenge the summons on any appropriate grounds. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, * * * as well as that it is protected by the attorney-client privilege * * *. In addition, third parties *might* intervene *to protect their interests,* or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, *may* intervene. [Emphasis added.]

We treat both of petitioner's theories together as, in our view, the same criteria for intervention apply under the Federal Rules and under the language of *Reisman* v. *Caplin*. Indeed, the Federal Rules are expressly made applicable to summons enforcement proceedings by Rule 81(a)(3), and there is nothing inconsistent with such application in *Reisman*.

Rule 81(a)(3) permits a flexible application of the

Rules to summons proceedings, expressly authorizing the district courts to limit the applicability of the Rules by local rule or order.[5] The Advisory Committee on the Rules stated the purpose as follows (note of the Advisory Committee, 7 Moore's *Federal Practice* (2d ed.), par. 81.01(6), p. 4413):

> * * * [A]lthough the provision allows full recognition of the fact that the rigid application of the rules in the proceedings themselves may conflict with the summary determination desired * * *, it is drawn so as to permit application of any of the rules in the proceedings whenever the district court deems them helpful.

The courts of appeals are in general agreement that the reference in *Powell* to the Federal Rules was not intended to impair the summary disposition of enforcement proceedings as long as the person summoned received all fundamental rights and an adversary hearing. See, *e.g., United States* v. *Gajewski,* 419 F.2d 1088 (C.A. 8), certiorari denied, April 20, 1970, No. 1261, 1969 term; *Venn* v. *United States,* 400 F.2d 207, 212, n. 12 (C.A. 5); *McGarry's Inc.* v. *Rose,* 344 F.2d 416, 418 (C.A. 1). Both *Venn* and *McGarry,* for example, sanctioned the continued use of petitions and show cause orders to commence enforcement proceedings in lieu of the conventional pleadings and measured responses which characterize ordinary civil litigation.

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[5] See, *e.g.*, Rule 24 of the Local Rules of the United States District Court for the Northern District of Indiana authorizing enforcement proceedings to be commenced by petition and order to show cause. *United States* v. *Benford,* 406 F. 2d 1192, 1193 (C.A. 7).

At the time of the *Powell* decision, Rule 24(a)(2) conditioned intervention of right upon a showing that the applicant "* * * is or may be bound by a judgment in the action." Under that version, it was not enough that the applicant reasonably feared such practical prejudice from the judgment as the application of comity in future litigation. *Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683, 694. In 1966, the Rule was amended to substitute the present provision allowing intervention of right where "the disposition of the action may as a practical matter impair or impede [the applicant's] * * * ability to protect" the interest asserted. But this did not eliminate all restraints upon intervention. The amendment was adopted in conjunction with the revision of Rules 19 and 23 relating to joinder of parties and class actions, with the general purpose to facilitate the effective resolution of controversies "by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse* v. *Camp,* 385 F.2d 694, 695 (C.A. D.C.). See also Notes of the Advisory Committee, 3B Moore's *Federal Practice* (2d ed.), par. 24.01(10), p. 24–17. In the context of a case allowing parents of school children to intervene in an action to compel redistribution of school resources, *Smuck* v. *Hobson,* 408 F. 2d 175, 179 (C.A.D.C.), the determination to be made in applying the amended rule was stated as follows:

> The decision whether intervention of right is warranted thus involves an accommodation between two potentially conflicting goals: to

> achieve judicial economies of scale by resolving related issues in a single lawsuit, and to prevent the single lawsuit from becoming fruitlessly complex or unending. Since this task will depend upon the contours of the particular controversy, general rules and past decisions cannot provide uniformly dependable guides. * * *

Similar conflicting goals are present in summons enforcement proceedings. The desire to resolve all potential claims which might be asserted by non-parties, relating to evidence sought through the enforcement of a summons, must be balanced against the desirability of permitting the Secretary of the Treasury to conduct investigations in furtherance of his duty to enforce the internal revenue laws without becoming hopelessly ensnarled in litigation over the scope of his investigatory authority. In view of these conflicting considerations, it is plainly an over-simplification to say that a taxpayer's natural interest in any investigation of his liabilities and the obvious detriment to him that can result from such an investigation automatically qualify him for intervention of right under Rule 24(a)(2) so that he may seek to stop the investigation. Rather, the "interest" and "impairment" pertinent to that Rule must be evaluated in the light of these considerations, especially since the Rule itself is subject to modification (under Rule 81(a)(3)) to fit the special needs of an enforcement proceeding. *Reisman* v. *Caplin* is fully consistent with such a balancing of equities.

B. INTERVENTION IN A SUMMONS ENFORCEMENT PROCEEDING SHOULD BE PREDICATED UPON A LEGAL INTEREST IN THE MATERIAL SOUGHT AND NOT MERELY UPON AN OBJECTION TO THE INVESTIGATION

The "interests" that may be asserted by a taxpayer seeking to intervene in judicial enforcement proceedings may be divided into three types. In the first place, he may assert that he has a proprietary interest in records sought through the enforcement of the third party summons. Such proprietary interest may, for example, give rise to a constitutional claim that enforcement of the summons would compel him to incriminate himself. Secondly, a taxpayer might claim that the records or testimony sought are privileged because, for example, they involve communications between the taxpayer and his attorney. Finally, like petitioner, he may have no proprietary interest or claim of privilege but nevertheless say that he is "interested" because the information sought may be used against him. In this last situation, he would normally—as in this case—seek to intervene in order to object to the purpose of the investigation or to the manner in which it is being carried out.

As we shall discuss, intervention is entirely appropriate in a reasonable effort to protect the first two kinds of interest, and there has been no dispute in such cases. The question that has given rise to serious conflicts among the courts of appeals—and to this case—is whether a taxpayer lacking a privilege or proprietary interest may intervene.

1. The conflicting views

This Court's language in *Reisman* v. *Caplin* did not define the "constitutional or other claims" or "interests" (375 U.S. at 445) that would entitle a taxpayer to intervene to oppose enforcement of a summons directed, as here, to a third party. The "claim" or "interest" at issue in *Reisman* was grounded upon the familiar concept of attorney's work product; conflict has subsequently arisen with respect to the possible broader application of those terms.

In *United States* v. *Benford*, 406 F. 2d 1192 (C.A. 7), for example, *Reisman* was interpreted as entitling a taxpayer to intervene as of right simply because his tax liability was the subject of investigation. The court ruled that the controlling stockholder of a corporation was entitled to intervene in an action to enforce an internal revenue summons issued to a corporate officer for the corporate books where the stockholder alleged that the investigation was being conducted to obtain evidence for use in a criminal prosecution and with the intent of harassing the stockholder into settling assessed tax deficiencies for earlier tax years.[6] District courts in the Seventh Circuit now allow intervention by the taxpayer automatically in cases where, as here, the taxpayer alleges that the purpose of the internal revenue investigation and sum-

[6] In *Benford*, the intervenor had earlier been convicted of attempting to evade taxes on unreported income of over one million dollars, for the years 1956 through 1960. The revenue agent assigned to audit tax years 1961 through 1965, the years in issue, testified that his preliminary investigation disclosed a continuing pattern of fraudulent practices.

mons is to determine whether he has committed criminal violations of the tax laws.[7]

Both the Third and Sixth Circuits have also read *Reisman* as sanctioning broad intervention rights. In *United States* v. *Bank of Commerce*, 405 F. 2d 931 (C.A. 3), a taxpayer's intervention was upheld upon his allegation that an internal revenue summons issued to a bank for records relating to the taxpayer was based upon information acquired by an illegal search; the taxpayer did not assert any proprietary interest in the bank records sought. Similarly, in *Justice* v. *United States*, 365 F. 2d 312 (C.A. 6), a taxpayer was allowed to intervene and raise constitutional objections to the bank's production of records pursuant to a summons.

The First and Second Circuits, as well as the Fifth Circuit in the opinion below, on the other hand, have held that the "interests" referred to in *Reisman* as warranting intervention do not include a taxpayer's concern about records which are the sole and unprivileged property of a third person. See *O'Donnell* v. *Sullivan*, 364 F. 2d 43, 44 (C.A. 1), certiorari denied, 385 U.S. 969; *Application of Cole*, 342 F. 2d 5, 7 (C.A. 2), certiorari denied, 381 U.S. 950. In *Cole*, the court stated, in holding that a taxpayer had no right to notice of the issuance of a summons (342 F. 2d at 7–8):

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[7] See *United States* v. *Learner*, 298 F. Supp. 1104 (S.D. Ill.); *United States* v. *Schoendorf*, 70-1 U.S.T.C., par. 9178 (E.D. Wis.); *United States* v. *Monsey*, 69-2 U.S.T.C., par. 9703 (S.D. Ind.).

> * * * [A]ll of the records, documents and papers which were the subject matter of the summons were the property of the Bank on whom the summons was served. None of the material sought belonged to the taxpayers or involved the work product of their attorneys. They had no interest in any of them in the sense that they had a right to any of them. * * * Reisman laid down no sweeping requirement that thenceforth all examinations of third parties must, to be valid, be preceded by notice to the taxpayer whose tax liability was being investigated.
>
> The taxpayer, under circumstances where only books, records and other papers belonging to the third party are the subject of the summons, has no standing to object to the summons * * *.

We submit that the approach of the First and Second Circuits and the court below is consonant with sound judicial administration, having due regard for the fundamental interests of taxpayers in certain records and communications while not unduly interfering with the performance of the Secretary's investigatory duties.

2. A taxpayer in petitioner's situation has no immediate interest that warrants disruption of investigative procedures that do not touch him directly and personally

As we have stated, it is proper for a taxpayer to intervene to assert his privilege or proprietary interest in material that is being sought from a third party. This is because his claim is that the disclosure would itself directly violate *his* rights with respect to *that*

material. Moreover, as with respect to evidence that is the proper subject of a motion to suppress under F.R. Crim. P. 41(e), there is a special reason why the propriety of the government's possession of the material should be determined preliminarily: If the material is tainted, the government may not use either that material, or other evidence derived from it, against the taxpayer, and prompt suppression will avoid the unscrambling problems that would otherwise arise at a trial. Thus, although intervention to present claims of privilege or proprietary interest disrupts the investigation in the short run, it is justified both by the strength of the taxpayer's immediate and direct interest and by considerations of judicial efficiency and fairness in the long run. In the terms of the intervention Rule, the taxpayer does have a direct "interest relating to the property * * * which is the subject of the [enforcement] action" and there is a real danger that enforcement will "impair or impede his ability to protect that interest."

In contrast, petitioner's interest is not directly in the material sought from Acme and Mercurio, but only in the outcome of the investigation in aid of which the summonses were issued. If—as is common, see pp. 28–29, *infra*—the investigation results in no prosecution, petitioner will not have been harmed by the investigation; even if (as has not been alleged here) the investigation might be attacked as indirectly harassing the taxpayer or impairing his business relationships, that detriment would not arise from enforcement of the summons but rather from the collateral circum-

stances of its issuance and any publicity that the investigation in general might have. Petitioner's objection to enforcement is thus not grounded upon any alleged interest that disclosure as such would invade but rather upon the collateral fact that disclosure in this manner would facilitate an investigation having a general purpose to which he objects. Moreover, petitioner's claim is not essentially that the government may not have the material it seeks, but rather only that it should not be allowed to obtain it in this manner; unlike privileged matter or matter in which the taxpayer has a proprietary interest, the information here in question would not be subject to suppression on any theory if the government found some other means to obtain it—for example through voluntary disclosure by the employer, examination of the employer's own tax returns, or by subpoena at trial. Strictly speaking in the language of the intervention Rule, therefore, petitioner has no "interest" directly "relating to the property or transaction which is the subject of the action."

By the same token, there is nothing that may transpire at the enforcement proceeding that will "as a practical matter impair or impede [petitioner's] ability to protect [his real] interest," granting that the parties to the enforcement proceeding will not assert his claims. To the extent that he has any valid objection to the manner in which the tax investigation is being carried out, that objection can and should properly be asserted in the broader context of the investigation as a whole. If petitioner is prosecuted, he can—

like any other criminal defendant—raise appropriate objections to the manner in which the indictment against him was obtained or, more particularly, object to the use of any evidence obtained by administrative investigative procedures on the ground that those procedures were abused. Compare *United States* v. *Blue,* 384 U.S. 251. There is no need for petitioner to be given an anticipatory power to disrupt an investigation that does not directly invade any of his personal rights.

Since petitioner's claim is based upon the alleged criminal nature of the investigation of his tax liabilities, it is pertinent to compare his position to that of potential criminal defendants generally who are under investigation. A person who is the subject of a criminal investigation has no right to interrupt the investigation except to the extent that his personal rights are invaded. Thus, he cannot suppress the fruits of a search of a third party or a third party's premises, even if that search was illegal and for the purpose of obtaining evidence against him. "The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Alderman* v. *United States,* 394 U.S. 165, 171–172. Petitioner no more has an "interest" that is "impaired" by a third party's disclosure of information about him than would he be "aggrieved" within the meaning of F.R. Crim. P. 41(e) by an illegal search of that third party. Nor does he have any better standing to object

to the enforcement of an internal revenue summons against the third party than he would have to object to a subpoena issued to that party to testify about petitioner's affairs before a grand jury.

3. There is a strong governmental interest in preventing disruptions of internal revenue investigations that are not necessary to the protection of the rights of taxpayers and witnesses

Those cases that have read this Court's decision in *Reisman* v. *Caplin* as sanctioning broad intervention by taxpayers to prevent enforcement of summonses directed to third parties have resulted in marked impairment of the utility of such summonses in tax investigations. Taxpayers now routinely notify summoned witnesses not to divulge information to the Internal Revenue Service and—like petitioner in this case—commonly obtain temporary restraining orders against witnesses who would otherwise cooperate with the government.[8] The result is substantial delay—in many cases as much as two years in the trial court alone[9]—in tax investigations while information grows

[8] Such restraining orders are based upon the Court's suggestion in *Reisman* that such relief against an otherwise cooperative witness is appropriate in order to protect any right that the taxpayer might appropriately assert to prevent disclosure. 375 U.S. at 449–450. See Meldman, *Taxpayers' Efforts to Restrain Third Party Witnesses' Compliance with a Summons*, 46 Taxes 685. Petitioner has followed this route on at least two prior occasions. See *United States* v. *Mothe*, 69–2 U.S.T.C., par. 9612 (E.D. La.); *United States* v. *Learner*, 298 F. Supp. 1104 (S.D. Ill.).

[9] Numerous examples of serious delays can be found even in the reported cases. *Foster* v. *United States*, 265 F. 2d 183 (C.A. 2), certiorari denied, 360 U.S. 912 (one and one-half year delay noted in concurring opinion); *In re Magnus, Mabee and Reynard, Inc.*, 311 F. 2d 12 (C.A. 2), certiorari denied, 373 U.S.

stale and statutes of limitations run. This Court recognized and gave effect to the congressional intent that such investigations not be unnecessarily hampered in *United States* v. *Powell, supra,* 379 U.S. at 54. See also, *e.g., United States* v. *Giordano,* 419 F. 2d 564 (C.A. 8), certiorari denied, April 20, 1970, No. 1219, 1969 Term; *United States* v. *Ryan,* 320 F. 2d 500, 502 (C.A. 6), affirmed, 379 U.S. 61.

II. AN INTERNAL REVENUE SUMMONS MAY PROPERLY BE USED IN AID OF A TAX INVESTIGATION CONDUCTED IN ORDER TO DETERMINE WHETHER A CRIMINAL PROSECUTION SHOULD BE RECOMMENDED

If the Court agrees that petitioner was properly denied intervention to object to enforcement of the summonses directed to Acme and Mercurio that is, of course, the end of this case. If not, we agree with petitioner that the Court should go on to decide the merits of the proposition of law upon which petitioner's proposed answer rests: that an internal revenue summons

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902 (two year delay noted in opinion); *United States* v. *Moriarty*, 70-1 U.S.T.C., par. 9145 (E.D. Wis.), earlier order reported at 278 F. Supp. 187 (E.D. Wis.) (two-year delay between order allowing discovery and order granting summary judgment for government); *United States* v. *Mothe*, 69-2 U.S.T.C., par. 9612 (E.D. La.) (record shows petition for enforcement was filed on November 26, 1968; an appeal from an order of enforcement is now pending befor the Fifth Circuit); *United States* v. *Schoendorf*, 70-1 U.S.T.C., par. 9178 (E.D. Wis.) (record shows petition for enforcement was filed February 3, 1969; an appeal from an order of enforcement is now pending before the Seventh Circuit); *United States* v. *Ahmanson*, 415 F. 2d 785 (C.A. 9) (two and one-half years delay in enforcing summonses).

may not properly be issued under Section 7602 or enforced under Sections 7402 and 7604 when its "primary purpose" is to assist the Internal Revenue Service in deciding whether or not to recommend to the Department of Justice that the taxpayer be criminally prosecuted. The court below held that such a purpose is not an improper one for the use of an internal revenue subpoena, and it should be affirmed.

The functions of intelligence division "special agents" unavoidably involve "ascertaining the correctness of [a] return [or] * * * determining the liability of [a] person for [an] internal revenue tax * * *", and therefore fall precisely within the functions for which internal revenue summonses are authorized by Section 7602. The legislative history clearly contemplates that special agents may use such summonses in aid of their criminal investigatory duties, without requiring any assessment of the relative weight of the civil and criminal elements in any particular investigation. Petitioner's contention amounts to the untenable proposition that the Internal Revenue Service must either forswear a criminal prosecution at the end of its investigation or else conduct that investigation without the aid of the summons procedures that have long been central to the effective administration of the tax laws.

A. THE CIVIL AND CRIMINAL ELEMENTS OF TAX INVESTIGATIONS ARE NECESSARILY INTERTWINED

The Internal Revenue Service is organized to carry out the broad responsibilities of the Secretary of the

Treasury, under Section 7801(a) of the Internal Revenue Code of 1954, to administer and enforce the internal revenue laws. See generally, Internal Revenue Service Organization and Functions, §§ 1112 *et seq.*, 35 Fed. Reg. 2417 *et seq.* A national, seven regional and fifty-eight district offices are appropriately subdivided to handle the specialized aspects of tax law enforcement. In each district an intelligence division and an audit division carry out the district director's responsibility for determining and assessing tax liability and investigating criminal and civil violations of the tax laws (§ 1118.3). The intelligence division (§ 1118.6).

> * * * enforces the criminal statutes applicable to income, estate, gift, employment and excise tax laws (except those relating to alcohol, tobacco, narcotics and certain firearms), by developing information concerning alleged criminal violations thereof, evaluating allegations and indications of such violations to determine investigations to be undertaken, investigating suspected criminal violations of such laws, recommending prosecution when warranted, and measuring effectiveness of the investigation and prosecution processes. * * *

The audit division (§ 1118.4) examines all types of returns

> (1) * * * based on doubt as to liability for taxes or for both taxes and statutory additions * * *. The audit program involves * * * participation with special agents of the In-

> telligence Division in the conduct of tax fraud investigations * * *.[10]

Further coordination is provided by an assistant regional commissioner for intelligence, presiding over a regional intelligence division, who (§ 1114.(10))

> [i]n conformity with intelligence policies, and programs, established by the National Office, * * * develops regional programs, standards and other measures necessary to implement most effectively the intelligence program of the Service *which includes the investigation of alleged tax fraud, certain other civil and alleged criminal violations of tax laws* * * *, and such other special investigations as the Commissioner may direct. * * * [Emphasis added.]

In addition, he supervises the review of special agents' reports of investigation submitted by the district offices in his region and approves or disapproves recommendations for prosecution. Further review of prosecution recommendations and referrals to the Department of Justice are made by the office of regional counsel for each region (§ 1116(3)).

An examination of the above described structure reveals several factors of importance to this case. To begin with, while a special agent of a district office intelligence division will initiate an investigation as a result of some allegation or indication of criminal

[10] In the large districts, a field office branch of the audit division conducts "special field examinations, as requested, including joint examinations with special agents of Intelligence Divisions where tax evasion may exist" (§ 1118.44).

conduct, the ultimate decision to refer the case to the Department of Justice for prosecution is not made until the investigation has been completed and reviewed by the assistant regional commissioner for intelligence and a regional counsel. Secondly, the special agent may well conduct his investigation in conjunction with the district office audit division, which division is charged with uncovering liability for taxes and statutory additions. Finally, the authority of the assistant regional commissioner for intelligence to administer regional intelligence programs addressed to both civil and criminal violations of the tax laws gives assurance that the investigations of the district office intelligence divisions will be utilized as part of a coordinated scheme to uncover both criminal and civil infractions.

Statistics compiled by the Commissioner for the 1969 fiscal year demonstrate the significance of the special agent's role in civil as well as criminal enforcement. 1969 Annual Report of the Commissioner of Internal Revenue, pp. 28–31. As the following table indicates, only slightly over one-half of the full-scale tax fraud investigations by intelligence divisions in 1969 resulted in prosecutions.[11]

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[11] Internal revenue summonses are normally issued only in connection with full scale investigations. Special agents also participate in preliminary screenings and investigations, only a fraction of which later lead to full-scale investigations.

1969 Tax Fraud Investigations by Intelligence Divisions

Type	Number	Deficiencies and penalties	
		Total	Average per case
Full-scale investigations	2,080		
Prosecution recommended [1]	1,049	$83,000,000	$79,000
Prosecution not recommended	1,031	20,000,000	19,000

[1] Of course, not all cases recommended for prosecution by the intelligence divisions are ultimately prosecuted. In 1969, the Office of the Chief Counsel found prosecution not warranted in 127 cases reviewed by it and the Department of Justice declined another 100. All told, 712 prosecutions were instituted in that year.

Thus, even in those cases where no prosecution recommendations were made, very substantial liabilities for tax deficiencies and penalties were uncovered.

B. NEITHER THE LANGUAGE NOR THE LEGISLATIVE HISTORY OF SECTION 7602 RESTRICTS THE USE OF SUMMONSES IN THE COURSE OF INTERNAL REVENUE SERVICE INVESTIGATIONS

In order to enable the internal revenue agents of the audit divisions and the special agents of the intelligence divisions to perform the necessary investigations to uncover civil and criminal tax law violations, the Secretary has delegated to them, as well as to others, the power to issue summonses under Section 7602 of the Code. Treasury Regulations 301.7602–1(c). This delegation is fully consistent with the language and legislative history of Section 7602.

Section 7602 sanctions the use of summonses to examine books and records and take testimony

> [f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax * * * or collecting any such liability * * *.

Under Section 6659(a)(2) of the Code, the term "tax" includes any additions or penalties assessed in addition to a tax deficiency. When any underpayment of tax is "due to fraud," the taxpayer is not only subject to criminal sanctions under Sections 7201 or 7206 of the Code, but is also liable for a 50 percent penalty under Section 6653(b). Clearly then, the determination of the "liability of any person for any internal revenue tax" necessarily includes an investigation into the possible existence of fraud to determine whether a penalty is included in the total amount of tax liability. The assignment of investigations to special agents of the intelligence divisions where reason exists to suspect fraud merely warrants that the possible criminal aspects of the case will be fully explored; the first, and often the final, step of such assignment is to determine the correct basic tax liability of the person under investigation, apart even from any penalty.

The legislative history of Section 7602 shows that the summons power was derived from Sections 3614 and 3615 (a)–(c) of the Internal Revenue Code of 1939 (see Table II to 1954 Code, 68A Stat. 969) and that these two sections had independent roots in revenue acts dating back to 1919 and 1864, respectively. An understanding of those two sections of the 1939 Code is essential since, in adopting Section 7602, Congress intended "no material change from existing

law." H. Rep. No. 1337, 83d Cong., 2d Sess., p. 436; S. Rep. No. 1622, 83d Cong., 2d Sess., p. 617.[12] The report of the House Ways and Means Committee on the 1954 Code commented in general terms on the revisions of procedural and administrative provisions of the Code (p. 99):

> Your Committee has made a comprehensive revision of the portion of the Internal Revenue Code relating to procedure and administration. The changes represent a substantial simplification of existing provisions. Administrative provisions presently scattered throughout the code have been brought together into a new subtitle. As a result of this reorganization it has been possible to combine a great number of provisions, shortening them and providing more uniform application for the various internal revenue taxes. * * *

For similar statements, see S. Rep. No. 1622, p. 133, and the remarks of Mr. Reed, House manager of the bill, 100 Cong. Rec. 3425.

The "existing law" before the adoption of the 1954 Code appeared in part in Section 3614(a) of the 1939 Code, which provided as follows:

> *To determine liability of the taxpayer.* The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return, where none has been made, is authorized, by any officer or employee of the

[12] As the promulgation of the 1939 Code itself merely codified existing law with no attempt to effect substantive changes, see, *e.g.*, S. Rep. No. 20, 76th Cong., 1st Sess., p. 1, earlier revenue acts must also be consulted to ascertain the meaning of specific provisions of that codification.

> Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

The Commissioner was first given the power to examine records and compel attendance of witnesses and take testimony in 1919 through the enactment of a virtually identical provision. Act of February 24, 1919, c. 18, 40 Stat. 1057, 1142, Sec. 1305.[13] Neither the committee reports nor the congressional debates contain any references to the meaning of the 1919 provision, with the possible exception of a reference by one Congressman to the large appropriations for enforcement contained in the revenue act to enable the Commissioner to prevent tax evasion and investigate returns. 56 Cong. Rec. 10237.

The other half of the "existing law" carried forward in Section 7602 was contained in Section 3615 (a)–(e) of the 1939 Code, which provided in pertinent part:

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[13] The 1919 provision was reenacted several times before becoming part of the 1939 Code. Act of November 23, 1921, c. 136, 42 Stat. 227, 310, Sec. 1308; Act of June 2, 1924, c. 234, 43 Stat. 253, 340, Sec. 1004; Act of February 26, 1926, c. 27, 44 Stat. (Part II) 9, 113, Sec. 1104; Act of May 29, 1928, c. 852, 45 Stat. 791, 878, Sec. 618.

(a) *General authority.* It shall be lawful for the collector, subject to the provisions of this section to summon any person to appear before him and produce books at a time and place named in the summons, and to give testimony or answer interrogations, under oath, respecting any object or income liable to tax or the returns thereof. * * *

(b) *Acts creating liability.* Such summons may be issued—

* * * * *

(2) *Failure to render return on time.* Whenever any person who is required to deliver a monthly or other return of objects subject to tax fails to do so at the time required, or

(3) *Erroneous, false or fraudulent return.* Whenever any person who is required to deliver a monthly or other return of objects subject to tax delivers any return which, in the opinion of the collector, is erroneous, false, or fraudulent, or contains any undervaluation or understatement, * * *

(c) *Persons liable.* Such summons may be issued to—

(1) *Persons mentioned in subsection (b).* Any person mentioned in subsection (b), or

(2) *Persons having books.* Any other person having possession, custody, or care of books of account containing entries relating to the business of any person mentioned in subsection (b), or

(3) *Other persons.* Any other person the collector may deem proper.

This section closely follows a provision first adopted in 1864, Act of June 30, 1864, c. 173, 13 Stat. 223, 226–227,

Sec. 14,[14] and reenacted several times prior to its codification in 1939.[15] That it sanctions the use of the summons to conduct investigations into criminal conduct can be strongly inferred not only from its own language but also from two related provisions in the 1939 Code. The immediately following section, Section 3616, imposes criminal sanctions upon any person delivering a false or fraudulent return with the intent of evading taxes as well as upon any person failing to appear pursuant to a summons issued under Section 3615. Secondly, Section 3654, in charging the collector with the duty of aiding in the "prevention, detection, and punishment of any frauds in relation" to the collection of revenue, authorizes him to issue summonses and compel compliance therewith "in the same manner as provided in Section 3615."

By combining Sections 3614 and 3615 (a)–(c) into Section 7602 in 1954 without intending to change

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[14] There were no committee reports on the 1864 Act. The debates in the House appear to assume that a summons could be used to obtain evidence of a criminal violation. See, *e.g.*, Cong. Globe, 38th Cong., 1st Sess., pp. 2660–2661, 2996–2997.

[15] Act of July 13, 1866, c. 184, 14 Stat. 101, Sec. 9; Act of December 24, 1872, c. 13, 17 Stat. 401, Sec. 1. In 1873 the provision was codified as part of Section 3173 of the Revised Statutes, which section was amended by Act of March 1, 1879, c. 125, 20 Stat. 327, 330–331, Sec. 3; Act of August 27, 1894, c. 349, 28 Stat. 509, 558–559, Sec. 34; Act of October 3, 1913, c. 16, 38 Stat. 114, 178–179, Sec. II. I (Eye); Act of September 8, 1916, c. 463, 39 Stat. 756, 774, Sec. 16; Act of February 24, 1919, c. 18, 40 Stat. 1057, 1146–1147, Sec. 1317; Act of November 23, 1921, c. 136, 42 Stat. 227, 312, Sec. 1311; Act of June 2, 1924, c. 234, 43 Stat. 253, 345–346, Sec. 1018; Act of February 26, 1926, c. 27, 44 Stat. (Part II) 9, 118, Sec. 1115.

existing law and as part of an effort to "combine a great number of [administrative and procedural] provisions, shortening them and providing more uniform application for the various internal revenue taxes," H. Rep. No. 1337, *supra*, p. 99, Congress clearly sanctioned the use of summonses in investigations into possible criminal conduct.

C. THERE IS NO BASIS IN PRECEDENT OR REASON FOR RESTRICTING THE USE OF INTERNAL REVENUE SUMMONSES IN INVESTIGATIONS PRIOR TO A RECOMMENDATION FOR PROSECUTION

The main thrust of petitioner's claim that a summons cannot be used for the primary purpose of investigating criminal conduct stems from the somewhat ambiguous dictum in *Reisman* v. *Caplin*, 375 U.S. 440, 449 that

> * * * the witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining *evidence for use in a criminal prosecution, Boren* v. *Tucker*, 239 F. 2d 767, 772–773 * * *. [Emphasis added.]

The present question was, of course, not litigated in *Reisman*. In any event, the reference to *Boren* v. *Tucker* places the statement in proper perspective. The *Boren* court, in affirming a district court's enforcement of a summons issued in furtherance of a tax fraud investigation, discussed at some length the inextricably related possibilities of both civil and criminal penalties in tax fraud cases and the statutory responsibilities of the Secretary to investigate both possibilities. In distinguishing the case of *United*

States v. *O'Connor*, 118 F. Supp. 248 (D. Mass.), it acknowledged that use of the administrative summons solely to aid the prosecution of a pending criminal action by the Department of Justice long after the special agent's investigation and report had been completed would be improper. But in the situation before it, the *Boren* court held the summons proper. This Court's use of the phrase "evidence for use in a criminal prosecution" in *Reisman* can well be read as referring only to the situation that the *Boren* court, in dictum, indicated would be improper. That situation is, of course, not present in this case and the Court need not decide here precisely where the line between a tax investigation and a tax prosecution—in which we are prepared to assume the administrative summons procedure can no longer be used—should be drawn. Certainly there is no tax prosecution under way when, as here, no recommendation has been made by the Internal Revenue Service to the Department of Justice.[16]

[16] The *O'Connor* opinion contains dicta questioning the propriety of compelling the production of evidence which might be used in a subsequent criminal prosecution by any means other than grand jury process. The recent decision of this Court in *United States* v. *Kordel*, 397 U.S. 1, lays that notion to rest, even if Section 7602 is construed to allow the use of summonses in civil investigations only. In *Kordel*, the Court found no infirmity in a conviction for violations of the federal food and drug laws despite the use by the prosecution of evidence secured in good faith through compelled answers to written interrogatories issued in a parallel civil proceeding. 397 U.S. at 11-13. While the *Kordel* opinion goes on to discuss situations where contemporaneous civil and criminal proceedings might be incompatible, none of those situations is presented here.

The courts of appeals in numerous cases following *Reisman* have sanctioned the use of internal revenue summonses in connection with investigations into both criminal and civil liability under the tax laws, *e.g.*, *McGarry* v. *Riley*, 363 F. 2d 421, 424 (C.A. 1), certiorari denied, 385 U.S. 969; *United States* v. *Hayes*, 408 F. 2d 932, 936 (C.A. 7), certiorari denied, 396 U.S. 835; *Wild* v. *United States*, 362 F. 2d 206, 209 (C.A. 9), and in some cases have expressly sanctioned the use of summonses regarded as issued principally to investigate criminal conduct, where no criminal prosecution is actually pending. *United States* v. *DeGrosa*, 405 F. 2d 926, 928 (C.A. 3), certiorari denied *sub nom. Zudick* v. *United States*, 394 U.S. 973; *Venn* v. *United States*, 400 F. 2d 207, 210 (C.A. 5); *United States* v. *Michigan Bell Telephone Co.*, 415 F. 2d 1284, 1286 (C.A. 6); *Howfield, Inc.* v. *United States*, 409 F. 2d 694, 697 (C.A. 9).

As we have shown, there can be no meaningful line drawn between the "civil" and "criminal" purposes of a special agent's investigation, and certainly no determination of the relative weight of such purposes, before the point is reached where an administrative decision has been made to recommend that the Department of Justice institute a criminal prosecution. Until that point—and even after, to the extent that the Service proceeds toward collection of the taxes owned—the purposes described in Section 7602 are necessarily being carried out. A failure to pay taxes when due gives rise to simultaneous civil and criminal

liabilities and, as we have shown, the presence of fraud is pertinent to both. Neither the language nor the legislative history of Section 7602 suggests any distinction between "civil" and "criminal" investigations of tax liabilities, and any effort to engraft such a distinction judicially would, as we have shown, interfere with the congressional purpose.

Effective, and therefore fair, administration of the tax laws requires that internal revenue officers not be fettered in their good faith use of the investigatory tools that Congress has provided them to determine the liabilities of taxpayers. Petitioner's contentions, if accepted, would require those officers, in commencing an investigation where fraud is suspected, to forswear either the potentiality of an ultimate recommendation for prosecution or the use of the summons procedures without which effective investigations cannot ordinarily be carried out. Neither the statute, nor, as this Court recently held in *United States* v. *Kordel*, 397 U.S. 1, 11, the fair administration of justice requires the courts so to "stultify enforcement of federal law".

Accordingly—although this case narrowly involves only a special agent's initial investigation at the district level—we urge the Court to hold, if it reaches the propriety of the summonses, that an internal revenue summons may properly be issued under Section 7602 if it is issued in good faith in aid of an investigation by the Internal Revenue Service prior to a final recommendation for criminal prosecution.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JUNE 1970.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6653. FAILURE TO PAY TAX

* * * * *

(b) *Fraud.*—If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a).

* * * * *

SEC. 6659. APPLICABLE RULES

(a) *Additions treated as tax.* Except as otherwise provided in this title—

* * * * *

(2) Any reference in this title to "tax" imposed by this title shall be deemed also to refer to the additions to the tax, additional amounts, and penalties provided by this chapter.

* * * * *

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

(a) *To Issue Orders, Processes, and Judgments.*—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be ne-

cessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

* * * * *

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having

possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned under oath, as may be relevant or material to such inquiry.

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

* * * * *

SEC. 7801. AUTHORITY OF DEPARTMENT OF THE TREASURY.

(a) *Powers and duties of Secretary.* Except as otherwise provided by law, the administration and enforcement of this title shall be performed by or under the supervision of the Secretary of the Treasury.

* * * * *

Federal Rules of Civil Procedure:

RULE 24.

Intervention

(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

* * * * *

RULE 81.

Applicability in General

(a) *To what proceedings applicable.*

* * * * *

(3) In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U.S.C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

* * * * *

Treasury Regulations on Procedure and Administration (1954 Code) (26 C.F.R.):

SEC. 301.7602–1 EXAMINATION OF BOOKS AND WITNESSES

* * * * *

(c) *Persons who may issue summons.* The following officers and employees of the Internal Revenue Service are authorized to issue a summons pursuant to sections 6420(e)(2), 6421(f)(2), and 7602—

(1) Regional commissioners and district directors.

(2) Inspection: Assistant Commissioner; director and assistant directors, Internal Secu-

rity Division; regional inspectors; and all internal security inspectors.

(3) Alcohol and Tobacco Tax: Assistant regional commissioners.

(4) Intelligence: Director; assistant director; assistant regional commissioners; executive assistants to assistant regional commissioner; chiefs, Review and Conference Staff; reviewer-conferees; chiefs and assistant chiefs of divisions, branches and sections; group supervisors; and special agents of the national, regional and district officers.

(5) International Operations: Director; assistant director; chiefs of divisions, branches, and groups; special agents; internal revenue agents; estate tax examiners; revenue service representatives; and assistant revenue service representatives.

(6) Collection: Chiefs and assistant chiefs of divisions; chiefs and assistant chiefs of the Delinquent Accounts and Returns Branches; group supervisors; and revenue officers.

(7) Audit: Chiefs of divisions and branches; group supervisors; internal revenue agents; and estate tax examiners.

U.S. GOVERNMENT PRINTING OFFICE: 1970

October Term, 1978

No. 65

[redacted]

v.

[redacted]

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

October Term, 1970

No. 65

KEVIN L. DONALDSON, f/k/a
MERTON H. SWEET, *Petitioner*

v.

UNITED STATES et al., *Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The Petitioner's principal arguments are set forth in full in the opening Brief. This Reply Brief will then be limited to responding to points raised by Respondents which either misconstrue or erroneously interpret the basic propositions relied upon by Petitioner in support of his position.

Reply to Respondent's Argument

The Government would now have this Court believe that the issues of "taxpayer intervention" and "improper criminal purpose" are separate questions,[1] whereas in fact these issues are interdependent. The Court of Appeals denied Petitioner intervention *because* no improper purpose existed.[2] Therefore this Court *must* consider the improper purpose issue in determining "taxpayer intervention" unless it rejects the entire rationale of the Court of Appeals.

I.

The Taxpayer is Entitled to Intervene in Third Party Summons Enforcement Proceedings

Petitioner Has a Right To Intervene Under Rule 24(a)

The United States cannot and does not seriously argue that Petitioner fails to meet each and every requirement of Rule 24(a).[3] It is undisputed that the subject matter of

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[1]The United States asserts at pp. 24-25 of its brief that a determination of *taxpayer intervention* is a condition precedent to this Court's consideration of the impropriety of Section 7602 administrative summonses in criminal investigations. See also Brief for the Respondent in Opposition to the Petition for Certiorari in *Kyriaco v. United States*, at p. 4, No. 448, October Term, 1970 "* * * The 'criminal purpose' issue will be reached in *Donaldson* only if *that petitioner* convinces this Court that the court of appeals erred in denying him intervention * * *."

This present position is clearly inconsistent with its unqualified statement at p. 7 of the Memorandum in Response to the Petition for Certiorari, i.e., the improper criminal purpose issue "would appear to be embraced in a grant of certiorari to review the right of Petitioner to intervene in this case."

[2]"There being no right which the appellant asserts that he could present to warrant the trial court's refusal to enforce the subpoena, the right to intervene has not been established." (A. 52)

[3]Government Brief at p. 15.

the Internal Revenue Service investigation is the Petitioner's liabilities under the Internal Revenue laws[4] and that his rights may be substantially impaired by improper or illegal investigative procedures. Further there is no doubt that Petitioner's interests are not adequately represented by the third parties upon whom summonses were served[5]. Rather the Government asserts that Rule 24(a) should not be applied with full vigor to the present case, citing the priviso to Rule 81(a) (3) and asserting that Petitioner's right to intervene

> must be balanced against the desirability of permitting the Secretary of the Treasury to conduct investigations in furtherance of his duty to enforce the Internal Revenue laws without becoming hopelessly ensnarled in litigation over the scope of his investigatory authority. [Government Brief at p. 15]

Stripped of euphemisms, this proposition is simply an assertion that the Service must be permitted to conduct whatever investigations it deems appropriate, by whatever means it thinks legitimate, without meaningful judicial supervision. Petitioner readily agrees that the Secretary of the Treasury must enforce the laws, but he contends that the Secretary should do so lawfully. The decisions of this Court in *Reisman v. Caplin,* 375 U.S. 440 (1964) and *United States v. Powell,* 379 U.S. 48 (1964), made it clear that enforcement of Section 7602 summonses must be subject to careful court scrutiny. The Secretary's laudatory desire to enforce the substantive tax laws provides no excuse for permitting him to dispense with Petitioner's right to intervene under Rule 24(a) and the doctrine of *Reisman v. Caplin, supra.*

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[4]See Summons, A. 9.

[5]Petitioner's Opening Brief at p. 14, fn. 7.

The Right To Intervene Does Not Depend On A Property Or Privilege Interest In The Summoned Material.

Contrary to the contention of the Government, a taxpayer is entitled to intervene regardless of whether he has a property or privilege interest in the summoned papers.[6] This Court so ruled in *Reisman*[7]. What is in issue in an enforcement proceeding is not the ownership of the summoned documents or the admissibility of summoned evidence at some possible later trial, but the propriety and legality of the investigative procedures being employed by the Government. When a summons has been served on a third party, however, there will be no meaningful test of its validity unless the real party in interest, the taxpayer under investigation, is permitted to intervene.

The Government perceives that the real purpose of a taxpayer's challenge of a Section 7602 summons is to protest unlawful investigative methods [Government Brief, p. 21]. It then argues, quite extraordinarily, that since the same information could be obtained by other means which may be permissible, Petitioner's objections to the present procedures should not be entertained.

Petitioner submits that the Congressional authority recently given to Special Agents under Section 7608(b) of the Internal Revenue Code of 1954[8] to execute and serve

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[6]Petitioner's Opening Brief, pp. 19-21.

[7]The Government persists in reading *Reisman* as if this Court's rulings were limited to what the Government regards as the facts of the case. First, the nature and breadth of this Court's opinion makes it clear that it was addressing itself to the procedures to be followed in *all* summons cases. Second, the only findings of fact in *Reisman*, those of the District Court, explicitly refute that the taxpayer there had any property or privilege interest in the materials summoned. 375 U.S. at 442.

[8]Printed at page 16 *infra*.

both search and arrest warrants and to make arrests was intended to rectify the inherent lack of authority to utilize summons power under Section 7602. Since the Government can investigate Petitioner by lawful means it should do so.

Suppression Is Not An Adequate Substitute For Intervention

The United States argues that at this stage of the proceedings, where Petitioner has not been indicted and is not on trial, it is premature to consider the legality and propriety of the investigation. [Government Brief at pp. 21-22] This proposition is supported by an assertion that, should Petitioner be indicted and prosecuted, he may suppress evidence illegally obtained.

Judge Jerome Frank fully rebutted this contention in *In re Fried,* 161 F. 2d 453 (CA 2, 1947).[9]

Further, by carefully delineating procedures according to which a taxpayer or summoned party may trigger enforcement proceedings in a District Court and there present objections to the summons, this Court's decision in *Reisman* clearly rejected any suggestion that suppression alone was an adequate remedy. Similarly, the Fifth Circuit itself has recognized that pre-compliance, judicial

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[9] "The Government further argues that an indictment founded upon such illicit evidence will do the applicant no harm, since such evidence will not be admitted at the trial which follows the indictment. That is an astonishingly callous argument which ignores the obvious. For a wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased. * * * Prosecutors have an immense discretion in instituting criminal proceedings which may lastingly besmirch reputations. That discretion is almost completely unfettered. It should surely not extend so far as to preclude judicial interference with a prosecutor's aim to induce an indictment by offering to a grand jury evidence which is the product of illegal acts of Federal officers." 161 F. 2d at 458, 459.

scrutiny is essential to the legal validity of the Internal Revenue Service summons procedure. *United States v. Roundtree,* 420 F. 2d 845, 855 (1969).

The suppression of improperly obtained evidence is a drastic and crude remedy which, by its very nature, cannot be used to cure all defects in the investigative process. Therefore, to conclude that taxpayers are not entitled to intervene would be tantamount to allowing the Government to conduct investigations by potentially illegal means without the possibility of correcting such defects and improprieties.

Taxpayer Intervention Does Not Disrupt or Delay Internal Revenue Service Investigations

The Government asserts at pages 23-24 of its Brief, that Petitioner ought to be denied any opportunity to intervene and test the legality of Section 7602 summonses because, in the present state of the law, tax investigations are being substantially delayed and hampered by the extensive litigation which commonly surrounds them. Petitioner rejects this assertion, for the current delays are attributable to the uncertainty of the rights of taxpayers being investigated by the Intelligence Division, not to the opportunity to raise legitimate objections.

It is true that federal courts across the country are currently filled with cases raising many aspects of the general question of the propriety and legality of the Revenue Service practice of conducting criminal investigations under the guise of the civil investigative authority conferred by Section 7602. Indeed, as the Government has admitted, virtually the *only* use currently made of the summons power conferred by Section 7602 is to further

full-scale criminal investigations conducted by the Intelligence Division. [Brief for the Government, p. 28, n. 11.]

Petitioner submits that what is called for is not the drastic curtailment of taxpayer rights suggested by the Government, but rather a clarification of the law. It must be made clear that any taxpayer under investigation, because he is the only and real party in interest, is entitled to intervene in enforcement proceedings in order to test the legality of Section 7602 summonses. Further, it must be made clear that the civil investigative powers conferred by Section 7602 cannot be employed for the sole or principal purpose of investigating crime. Once the law is clarified, there will no longer be delays, and the Internal Revenue Service will be able to conduct all legitimate investigations authorized by Section 7602.

II.

A Section 7602 Summons Cannot be Used for the Improper Purpose of Establishing a Prosecutable Criminal Case

Special Agents Are Not "Unavoidably Involved" In the Civil Purposes For Which Section 7602 Permits Investigations

The unmistakable import of the language in Section 7602 is directed solely towards the investigation, determination and collection of civil tax liabilities. Nothing in its wording refers to the enforcement of criminal tax laws or to investigations undertaken in order to discover or prove that such laws have been violated.[10] The

[10]Patently, the "liability" which may be investigated under Section 7602 does not include criminal "liability" but rather only a "collectable" — *i.e.* monetary — liability.

Government, however, argues that Special Agents, such as the ones investigating Petitioner, pursue the wholly civil purposes for which investigations under Section 7602 are authorized.

A cursory examination of the respective functions of the Agents of the Internal Revenue Service reveals the fallacy of the proposition advanced by the United States. The Intelligence Division is responsible for the investigation and detection of criminal frauds upon the Revenue;[11] whereas, the Audit Division is charged with the determination of civil tax liability.[12] The description given by the Service itself of the duties of a Special Agent refute the Government's contention. The Service specifically denominates Special Agents as "criminal investigators." The duties and responsibilities of a Special Agent are to conduct *tax evasion investigations* and to perform other related duties, such as testifying as a Government witness and assisting the United States Attorney during the preparation or trial of a criminal tax case.[13] No part of the function of a Special Agent, as described officially by the Government, involves civil tax work, all of which is performed by Revenue Agents.[14] In particular, it should be noted that whenever and as soon as a Revenue Agent finds definite indications of fraud or criminal potential, he must refer the case to the Intelligence Division. *Mathis v. United States,* 391 U.S. 1, 6 n. 2 (1968) (White, J., dissenting.) To the ex-

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[11]Internal Revenue Service Statement of Organization and Functions, §1118.6, 35 Fed. Reg. 2417, 2454 (1970).

[12]Internal Revenue Service Statement of Organization and Functions, §1113.53, 35 Fed. Reg. 2417, 2422 (1970).

[13]GSA job description, SPD No. 335, July 3, 1962, printed at page 17 *infra.*

[14]GSA job description, SPD No. 226, January 6, 1960, printed at page 19 *infra.*

tent that a Special Agent may incidentally determine that some tax is owing, that determination does not represent the Service's position with respect to any possible civil deficiency.[15] Further, in financially complex cases Revenue Agents are assigned to help Special Agents understand the tax aspects of their criminal investigation, and it is these Revenue Agents, not the Special Agents, who complete the audit portion of the case.[16] In short, there is no substance to the Government's allegation that Special Agents conduct civil as well as criminal investigations.

Legislative History Does Not Support the Government

The Government has argued that even if the language of Section 7602 does not indicate that it may be used for criminal investigations, the legislative history of the provision indicates that Congress intended such a use. [Government Brief, pp. 29-35] The argument appears to be that Section 7602 of the 1954 Code can be traced back to both Section 3614 and Section 3615(a)-(c) of the 1939 Code, and that since the latter section arguably indicates that criminal investigations may be conducted pursuant to its provisions, a similar power inheres in Section 7602.

This argument must rest wholly on the language and context of Section 3615(a)-(c), for the language of Section 3614 is similar to that of Section 7602. The Solicitor General appears to have *linked* Section 7602 to Section 3615(a)-(c) solely on the authority of Table II

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[15]Burns, "Searches and Seizures: The Suppression of Evidence," 20 N.Y.U. Inst. on Fed. Tax. 1081, 1081-1089 (1962).

[16]Id. at 1089, and GSA job description, infra, p. 20.

to the 1954 Code. However, the Table does not *link* the two sections. Congress prefaced that Table with this statement:

> The following tables have been prepared as *aids in comparing* provisions of the Internal Revenue Code of 1954 with provisions of the Internal Revenue Code of 1939. *No inference, implication, or presumption of legislative construction or intent shall be drawn or made by reason of such tables.*
>
> [Emphasis added. Internal Revenue Code of 1954, United States Code and Administrative News, p. 1013, 68A Stat. 931.]

Incidental Civil Aspects Do Not Legitimize An Investigation Whose Principal Purpose Is Criminal

The United States urges that because the existence of a tax deficiency is a necessary element of a criminal case, it follows that determination of tax liability is an essential purpose of every criminal tax investigation. The basic fallacy in the Government's "purpose" argument can be demonstrated best by comparing tax evasion investigations with investigations to uncover embezzlement of Federally insured funds. It could not be seriously contended that a Federal Bureau of Investigation Agent has a "civil purpose" simply because he must determine the amount of money embezzled.

Secondly, the Government's stress on the alleged dual purpose of a Special Agent's investigation, and the argument that no assessment can be made of the relative weight of the civil and criminal purposes prior to a recommendation for prosecution, is rebutted by the recent

resort to search warrants in *United States v. Premises, 810 N. Seventh St.*, 310 F. Supp. 1316 (S.D. Ill. 1970), *on appeal* 7th Cir., No. 18,487; and *United States v. Premises, 7260 S.W. 131 St., etc.*, Commissioner's Dkt. No. 6, Case Nos. 69-308 and 69-309, S.D. Fla. Clearly, an overriding criminal purpose is essential to the issuance of a search warrant. Inasmuch as the investigations in the cited cases were initiated by search warrants, it is apparent that the Service was able to make a meaningful distinction between "civil" and "criminal" purpose long before a recommendation to the Department of Justice.[17]

Finally, even if it were the case that some Section 7602 investigations conducted by Special Agents are justified because those agents must determine that taxes are owing in order to prove a criminal violation, this justification would not apply to the investigation of Petitioner. The Internal Revenue Service is investigating Petitioner for alleged failure to file income tax returns for the years 1964 through 1967.[18] Since tax returns must be filed by every individual who has more than $600 of gross income, regardless of whether any tax is owed, the Special Agents

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[17]At page 8 of its Brief, the Government argues that "there is no such thing as an investigation having a 'primary' criminal purpose," for many investigations do not produce recommendations to prosecute and most uncover large deficiencies. It is patently incorrect, however, to suggest that the *purpose for which an investigation is undertaken* can be determined by the *results* of the investigation. *cf. United States v. Dickerson*, 413 F. 2d 1111 (C.A. 7, 1969), discussed at p. 35 of Petitioner's Brief.

[18]*United States v. Mothe* (E.D. La., 1969), on appeal to the Fifth Circuit, Docket No. 28,640, involving one of the same Special Agents and Petitioner. Trial testimony of Special Agent Miller set forth in *Mothe* Appendix at p. 42, a copy of which has been filed with the Clerk of the Supreme Court.

investigating Petitioner do not have to make any of the determinations authorized by Section 7602.[19]

Disallowing Improper Use of Section 7602 Summonses Will Not Impede Intelligence Division Investigations

Special Agents have adequate means for conducting criminal investigations independent of Section 7602. Section 7608(b) specifically authorizes Special Agents to execute and serve search warrants.[20] Thus the legitimate need of the Internal Revenue Service to conduct civil investigations would not be frustrated by forbidding the use of Section 7602 for criminal investigations. Requiring the Service to employ different procedures for conducting criminal and civil investigations would comport with the Service's own internal policies of suspending all civil aspect until after criminal prosecution.[21] Recently the Government again reaffirmed that all civil claims are postponed pending a criminal trial. *United States v. Monsey*, 70-2 USTC 9578, at 84,416.

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[19]*United States v. Gorman*, 393 F. 2d 209, 213 (C.A. 7, 1968); and, *Lumetta v. United States*, 362 F. 2d 644, 647 (C.A. 8, 1966).

[20]Examples of the use of such authority are cited at p. 11, *supra*.

[21]Regulations of the Treasury Department explicity state that the normal civil procedures do not apply in any case in which criminal prosecution is under consideration. Reg. §601.105(g). *Campbell v. Eastland*, 307 F. 2d 478, 487 (CA 5, 1962), *cert. den.* 381 US 955 (1963).

United States v. Jaskiewicz, 278 F. Supp. 525, 536-537 (E.D. Pa. 1968). Quoting the Policy Manual of the Internal Revenue Service:

> • • • Experience has demonstrated that attempts to prosecute both the criminal and the civil aspects of a case concurrently may seriously militate against success with respect to either. • • • the imposition of criminal sanctions in the cases selected for prosecution

III.

Constitutional Doubts Require a Narrow Statutory Construction of Section 7602

Although Petitioner has not alleged a violation of his Fourth Amendment rights, serious Fourth Amendment questions are raised by *any* construction of Section 7602 under which Internal Revenue summonses could be used for the sole or principal purpose of investigating crime.

It is a familiar rule of this Court that, whenever there are alternative interpretations of a statute, and one of those alternatives would raise serious doubts as to the constitutionality of the statute as applied, the interpretation which avoids the constitutional issue will prevail. *Crowell v. Benson,* 285 U.S. 22, 62 (1932); *Ashwander v. TVA,* 297 U.S. 288, 348 (1936) (Brandeis, J. concurring).

The requirements for the issuance and enforcement of Internal Revenue summonses fail to meet Fourth Amendment standards for investigations conducted to discover or prove criminal conduct.[22] This Court's decisions in *Camara v. Municipal Court,* 387 U.S. 523 (1967), and

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should be considered paramount in relation to the civil tax aspects of the cases.

Accordingly, jeopardy and deficiency assessments will not be made, waivers and consents will not be requested, statutory notices of deficiency will not be issued *nor will any other action be taken with respect to the civil liability in cases in which a recommendation for criminal prosecution is likely* or has been made, if such action would imperil successful criminal investigation or prosecution.

(See Chapter 4500, P-4560-3, Approved 3/2/60) [Emphasis supplied].

[22]Section 7602 summonses are issued by the investigating agent, "the officer engaged in the often competitive enterprise of ferreting out crime," rather than a "neutral and detached magistrate." *Mancusi v. DeForte,* 392 U.S. 364, 371 (1968), quoting from *Johnson v. United States,* 333 U.S. 10, 14 (1948).

See v. City of Seattle, 387 U.S. 541 (1967), make it clear that the Amendment must be complied with even when a governmental agency conducts an administrative search which is *not* "personal in nature" or "aimed at the discovery of evidence of crime." 387 U.S. at 537.

The doctrine of *Crowell v. Benson,* requiring a statutory construction of Section 7602, not in violation of the Fourth Amendment, precludes the use of a summons for the sole or principal purpose of establishing a prosecutable criminal case.[23]

Although a summons issued pursuant to Section 7602 is not enforceable without the independent order of a court, this Court recognized long ago that:

> [T]he subpoena is in form an official command, and even though improvidently issued it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command or their natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation. [*Cudahy Packing Co. v. Holland,* 315 US 357, 363-64 (1942)]

Even if the summoned person is sufficiently knowledgeable to insist upon court enforcement, it has generally been assumed that a showing of probable cause is not a prerequisite to enforcement of a section 7602 summons. *United States v. Powell,* 379 U.S. 48 (1964).

[23]This issue is fully discussed in *Kyriaco vs. United States,* No. 448, October Term, 1970, pp. 17-22. *Petition for Writ of Certiorari* pending, where Petitioner's fourth amendment rights are clearly in issue.

Conclusion

For the foregoing reasons and those stated in the Petitioner's Opening Brief, the judgments below should be reversed.

Respectfully submitted,

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Dated: October, 1970

Addendum

Title 26, U.S.C., Section 7608(b):

ENFORCEMENT OF LAWS RELATING TO INTERNAL REVENUE OTHER THAN SUBTITLE E.—

(1) Any criminal investigator of the Intelligence Division or of the Internal Security Division of the Internal Revenue Service whom the Secretary or his delegate charges with the duty of enforcing any of the criminal provisions of the internal revenue laws or any other criminal provisions of law relating to internal revenue for the enforcement of which the Secretary or his delegate is responsible is, in the performance of his duties, authorized to perform the functions described in paragraph (2).

(2) The functions authorized under this subsection to be performed by an officer referred to in paragraph (1) are—

(A) to execute and serve search warrants and arrest warrants, and serve subpeonas and summonses issued under authority of the United States;

(B) to make arrests without warrant for any offense against the United States relating to the internal revenue laws committed in his presence, or for any felony cognizable under such laws if he has reasonable grounds to believe that the person to be arrested has committed or is committing any such felony; and

(C) to make seizures of property subject to forfeiture under the internal revenue laws.

GS-1811-12
(Special Agent)
SPD No. 335
July 3, 1962

INTERNAL REVENUE SERVICE

Classification: Criminal Investigator, GS-1811-12
Organizational Title: Special Agent
Location: Intelligence Division

I. DUTIES AND RESPONSIBILITIES

Plans and conducts tax evasion investigations of greater than average complexity and importance, that is, those potentially with several of the following or equivalent characteristics:

Investigations typically concern one or more violators (usually highly successful professional or business men, frequently recognized leaders in their fields; or gamblers or racketeers of more than local notoriety with income from legitimate as well as illegitimate sources; or corporate entities having business operations outside the immediate locality with a large number of activities, operations, and transactions whose interrelationships are very difficult to establish).

Evidence is usually obtained through the interrogation of a large number of employees, business associates, and other persons throughout the area who have knowledge of the taxpayer's operations. Determination of tax evaded usually involves complex problems in reconstructing records from incomplete data or in analyzing and interpreting available records, or, in the absence of records, applying indirect accounting techniques such as the net worth method in income tax cases. In many cases proof of wilfulness on the part of any individual is very difficult to establish because of the concealed nature of the transactions and the involvement of numerous persons in unusual schemes of tax evasion. Extensive

investigation may be necessary also to counteract ingenious efforts by accountants or attorneys representing the suspected violator to interpose defenses or raise issues in attacking the Government's position.

Investigations are often conducted jointly with one or more Internal Revenue Agents or Revenue Officers; this imposes upon the Special Agent GS-12 difficult problems in proper planning and coordination of the work, determining the most appropriate method of procedure, sequence and timing of inquiries, etc. Occasionally other Special Agents will also be assigned to assist in such investigations.

Investigations of alleged violations may result in the discovery of additional violations and may require personal or written collateral inquiry into operations or transactions occurring elsewhere in the district, region, or in other regions.

Issues of substantial delicacy may arise in the course of the investigations, as, for example, where the principal sources of information are individuals or firms which are largely dependent upon the suspected violator for their principal sources of income; or where it becomes extremely difficult to avoid action which may result in undue and extensive damage to the business or professional reputation of individuals; or where situations develop which make it difficult to avoid the appearance of discriminating against certain individuals, particularly those holding or seeking public office or those of political prominence.

The nature and method of violation and the involvement of individuals of considerable prominence or notoriety within the area often result in cases achieving considerable attention by the press and other news media within the district.

In addition to work typified above, performs special duties including training new Special Agents and serving as acting Group Supervisor when designated. Per-

forms other related duties such as testifying as a Government witness, assisting the United States Attorneys during the preparation or trial of a case, or conducting collateral inquiries.

From time to time, is assigned to assist or otherwise perform work on cases at locations other than his official headquarters. Such work is of the difficulty and responsibility described in this standard position description.

II. SUPERVISION AND GUIDANCE RECEIVED

Work is usually under the very general supervision of a designated Intelligence supervisor who seldom issues instructions with assignments (except for making known specific information he may have) but who is available for general consultation and guidance.

Reports are given a general review to ensure that conclusions are sound and recommendations are supported by the evidence.

INTERNAL REVENUE SERVICE

SPD No. 226
January 6, 1960

Classification: Internal Revenue Agent GS-512-11
Organizational Title: Internal Revenue Agent
Location: District Audit Division Field Group

I. NATURE AND PURPOSE OF WORK: This is the position of a broadly qualified Internal Revenue Agent who conducts independent field examinations of a wide range of income tax returns or other audit investigations which can be expected to involve a general variety of tax law, accounting, or investigative problems.

Representative assignments include returns from individuals, partnerships, fiduciaries, and corporations re-

quiring the application of usual audit and investigative procedures in the review of business activities and records to determine correct tax liability. For example, some returns are of sizeable retail businesses such as automobile dealers, department stores, etc.; small manufacturing operations such as of apparel, furniture, jewelry, luggage, etc.; and varied retail and wholesale trade. In addition, other returns assigned may be from individuals reporting substantial to high income from one or more sources or presenting problems of family or business relationships affecting proper determination of tax liability.

Assignments may be expected to include from time to time other types of tax returns requiring similar field examination techniques or investigative inquiry. Makes other special investigations such as those pertaining to claims, offers-in-compromise, or collateral requests. As required, conducts investigations jointly with a Special Agent and completes audit portion, furnishes tax information assistance to the public, trains agents in lower grade, classifies returns, serves as administrative officer in charge, or performs other special duties. When designated holds informal conferences on cases from other examiners that did not result in agreement and taxpayer desires a further hearing. Discusses the case issues with the taxpayer and the examiner and seeks to compose differences where possible and arrive at a proper determination of the facts and application of pertinent provisions of laws and regulations. Prepares an informal conference report to explain action taken and to provide the basis for any necessary revision of the examiner's report.

II. SCOPE AND EFFECT: The work is usually of general variety and broad scope. There is the risk of significant error in some cases, but it is normally expected that issues will be brought into fairly good focus. Adjustments or tax changes proposed are important although varying in number, kind, and amount in given cases. Not infrequently, enforcement impact of work extends beyond the immediate taxpayer involved to other similar taxpayers and business associates through tendency of word to get around.

III. SUPERVISION: General supervision over work is exercised by the group supervisor who issues occasional instructions, reviews progress or general aspects of the work, and is available from time to time for consultation in unusual, unprecedented, or sensitive matters. Supervisory review of reports submitted is cursory, depending upon the time available for this purpose, and the need for ensuring that any special problems are recognized and considered. Final technical review of the case file is made by the Review Staff, and this is a comprehensive check on the full technical aspects involved.

IV. MENTAL DEMANDS: Determines the probable extent of examination or investigative inquiry necessary through study of the return, schedules and other information attached. Devises a general plan for the audit subject to revision after initiating contacts, and further study of preliminary findings from review of taxpayer records or investigative developments and from problems arising. Exercises alertness in detecting indications of fraud during the course of examinations. Problems or questions encountered and resolved independently largely on accounting, tax law, or other basis such as business practice, precedent, policy, etc., are varied and require a good knowledge of the code and regulations and of accounting and auditing procedures. Examples are general issues such as capitalization vs. expense treatment, reasonableness of deduction, business necessity for expenditure, basis in property, depreciation or depletion practices, method of accounting, reserves, interpretation of contracts, leases and similar business documents, and other features such as machine accounting, bankruptcy or receivership, closely held corporations, indications of inadequate records, and patents, royalties or copyrights.

V. CONTACTS: Initiates varied personal contacts with taxpayers and representatives, business associates, real estate agents, appraisers, bank officials, employees, etc., to obtain or verify information concerning operations, transactions, business records, etc., necessary for determining proper tax liability. Many of these contacts

are distinguished by the variety or complexity of issues, multiplicity of business transactions, or circumstances of business association or relationshp. A substantial number of the taxpayers contacted may be represented by tax counsel; others may be intimately familiar themselves with tax matters under discussion.

VI. QUALIFICATIONS: Good knowledge of accounting and auditing, tax law, and general investigative methods; ability to determine the most effective avenue in conducting field examinations of returns from many different individuals and businesses, and to solve most audit problems independently. Skill in the interpretation, discussion, and application of tax laws, regulations and court decisions. Ability to prepare complete and lucid reports of examinations completed.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DONALDSON, FKA SWEET *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 65. Argued November 19, 1970—Decided January 25, 1971

In furtherance of an investigation of petitioner's tax returns, respondent Grady, an Internal Revenue Service (IRS) Special Agent, issued summonses to petitioner's putative former employer (Acme) and its accountant for the production of Acme's records of petitioner's employment and compensation during the years under investigation. The summonses were issued under § 7602 of the Internal Revenue Code of 1954, which authorizes IRS examinations of records and witnesses for the purpose of determining tax liability. Thereafter respondents, pursuant to 26 U. S. C. §§ 7402 (b) and 7604 (a), filed in the District Court petitions for enforcement of the summonses. Petitioner filed motions to intervene in the enforcement proceeding, relying on Fed. Rule Civ. Proc. 24 (a)(2), which, *inter alia*, provides for intervention in an action "when the applicant claims an interest relating to the property or transaction which is the subject of the action . . . ." Petitioner alleged that the IRS agents were investigating him solely to obtain evidence concerning criminal violations of the tax laws and that consequently the summonses were not issued for any purpose within the scope of § 7602 and could not be enforced. The court denied petitioner's motions and ordered that the records be produced. The Court of Appeals affirmed. *Held:*

1. Petitioner has no proprietary interest in the Acme records (his sole interest therein being that they presumably contain details of payments to him), and since he has no other protectable interest by way of privilege or otherwise, he has no absolute right under Fed. Rule Civ. Proc. 24 (a)(2) to intervene in the IRS summons enforcement proceeding. Pp. 10–14.

Syllabus

2. Under § 7602 an IRS summons may be used in connection with a tax investigation if (as in this case) it is issued in good faith and prior to a recommendation for prosecution. Pp. 14–19.

418 F. 2d 1213, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, HARLAN, STEWART, WHITE, and MARSHALL, JJ., joined. DOUGLAS, J., filed a concurring opinion. BRENNAN, J., concurred in the result.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 65.—October Term, 1970

Kevin L. Donaldson, fka Merton H. Sweet, Petitioner, *v.* United States et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January 25, 1971]

Mr. Justice Blackmun delivered the opinion of the Court.

We are here concerned with problems arising in connection with the issuance and judicial enforcement of an internal revenue summons directed to someone other than the individual taxpayer.

Kevin L. Donaldson, formerly known as Merton H. Sweet, apparently was once employed by, or was a performer for, Acme Circus Operating Company, Inc., dba Clyde Beatty-Cole Bros. Circus.[1] Mr. Donaldson (sometimes referred to herein as the "taxpayer") is an individual whose income tax returns for the calendar years 1964–1967, inclusive, are under investigation by the Internal Revenue Service.

On September 12 and 13, 1968, Special Agent John P. Grady, purportedly acting under the authority of § 7602 of the Internal Revenue Code of 1954, 26 U. S. C. § 7602,[2]

[1] The record does not specifically support the fact of Donaldson's employment by, or performance for, Acme. In the context of the case, however, this is implied and, obviously, the investigation is directed to the ascertainment of the fact.

[2] "§ 7602. Examination of books and witnesses

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability

issued and served separate summonses to Acme and to Joseph J. Mercurio, Acme's accountant, commanding their appearance before Grady on September 23 and 24 "to give testimony relating to the tax liability" of Donaldson and to produce certain of Acme's records having to do with the taxpayer. The records specified were "applications for employment and/or any other records containing background data including Social Security number furnished you by" the taxpayer; all contracts between the taxpayer and Acme and between him "and the various organizations sponsoring performances of the circus . . . during . . . 1964 through 1967, inclusive"; Forms 1099 and W–2 issued to the taxpayer; a schedule of the payments made to the taxpayer by the sponsoring organizations; checks and vouchers relating to payments to taxpayer by Acme; expense vouchers submitted by the taxpayer; records containing information as to the identification of each sponsoring organization; and "correspondence or other records relating to the foregoing or to any other financial transactions between Acme" and the taxpayer during 1964–1967, inclusive.

Shortly prior to the issuance of these summonses, the United States District Court for the Middle District of Florida, upon petitions filed by the taxpayer, issued tem-

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of any person for any internal revenue tax . . . or collecting any such liability, the Secretary or his delegate is authorized—

"(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

"(2) To summon the person liable for tax . . . or any person having ing possession, custody, or care of books of account containing entries relating to the business of the person liable for tax . . . or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant to such inquiry; and

"(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

porary restraining orders, and then, as to Mercurio, a preliminary injunction, restraining Mercurio and Acme from complying with Grady's requests or with any subsequent summons directing the production of the records "until such time as an order of a court of competent jurisdiction has been issued requiring such compliance."

On November 25, 1968, the United States and Agent Grady, pursuant to 26 U. S. C. §§ 7402 (b) and 7604 (a),[3] filed petitions with the same federal court for the judicial enforcement of the summonses directed to Mercurio and to Acme. The petitions were supported by affidavits of Grady and of Special Agent Bruce B. Miller.[4] Each affidavit was to the effect that the affiant was conducting or assisting in the conduct of "an investigation for the purpose of ascertaining the correct income tax liability" of the taxpayer for the years 1964–1967, inclusive, and that it was "necessary" to examine the records and to take the testimony requested in order to ascertain the taxpayer's correct income tax liability for those years.

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[3] "§ 7402. Jurisdiction of district courts

. . . . . .

"(b) To enforce summons.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data. . . ."

"§ 7604. Enforcement of summons

"(a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data. . . ."

[4] Agent Grady worked from the Tampa District Office of the Internal Revenue Service, and Agent Miller from the New Orleans District Office. The taxpayer had a New Orleans address; Mercurio and Acme possessed Florida addresses.

In response to the ensuing orders to show cause, the taxpayer, purportedly pursuant to Rule 24 (a)(2), Fed. Rules Civ. Proc., filed motions to intervene in the enforcement proceedings. He accompanied each motion with a proposed answer. In the answer he alleged that Special Agents Grady and Miller were guilty of bad faith in asserting that they were conducting an investigation to ascertain the taxpayer's correct income tax liability for the years in question; that the two agents were assigned to the Intelligence Divisions of the Service; that they were investigating the taxpayer "for the express and sole purpose of obtaining evidence concerning any violations of the criminal statutes applicable to the tax laws of the United States"; and that, as a consequence, the summonses were not issued for any purpose within the scope of § 7602. It was also asserted, although apparently it is not now urged here, that the requests in the summonses were overly broad and "without a showing of particularized relevancy," and that the taxpayer, under the Constitution, "is entitled to be secure in his personal papers and personal effects from unreasonable searches and seizures."

Mercurio and Acme, on their part, also filed responses to the orders to show cause. Each alleged that "were it not for" the preliminary injunction or temporary restraining order theretofore entered, "the Respondent would have complied with the summons." [5]

The orders to show cause were returnable before Judge Lieb. After the submission of memoranda and argument, but without the introduction of testimony, the court denied the motions to intervene and ordered Mercurio and Acme to appear before Grady and to produce

[5] Mercurio and Acme are not active parties to the present review. They advise the Court that they are "ready to follow the orders of the court, and are nominal parties only."

the records requested. The court then consolidated the two cases for purposes of appeal and granted stays pending appeal. The Fifth Circuit affirmed. *United States* v. *Mercurio*, 418 F. 2d 1213 (CA5 1969).

Certiorari was granted, 397 U. S. 933 (1970), because the case appeared to raise important questions relating to the administration and enforcement of the revenue laws, and because the courts of appeals have differed in their reading of *Reisman* v. *Caplin*, 375 U. S. 440 (1964).[6]

I

Despite the contrary intimations in the motions to intervene, there is now no constitutional issue in the case. The taxpayer on oral argument so conceded.[7] In any event, that question appears to have been settled long ago when the Court upheld, against Fourth Amendment challenge, an internal revenue summons issued under the Revenue Act of 1921 and directed to a third-party bank. *First Nat'l Bank* v. *United States*, 267 U. S. 576 (1925), affirming 295 F. 142, 143 (SD Ala. 1924). See also *United States* v. *First Nat'l Bank*, 274 F. Supp. 283, 284 (ED Ky. 1967), aff'd, 390 U. S. 199, and *United States* v. *Shlom*, 420 F. 2d 263, 266 (CA2 1969), cert. denied, 397 U. S. 1074.

II

We emphasize initially, as did Judge Tuttle in his opinion for the Court of Appeals, 418 F. 2d, at 1214, that what is sought here by the Internal Revenue Service

[6] Compare the Fifth Circuit's holding in the present case and *In re Cole*, 342 F. 2d 5 (CA2 1965), cert. denied, 381 U. S. 950, and *O'Donnell* v. *Sullivan*, 364 F. 2d 43, 44 (CA1 1966), with *United States* v. *Benford*, 406 F. 2d 1192 (CA7 1969); *United States* v. *Bank of Commerce*, 405 F. 2d 931 (CA3 1969); and *Justice* v. *United States*, 365 F. 2d 312 (CA6 1966).

[7] Transcript pp. 9–10.

from Mercurio and from Acme is the production of *Acme's* records and not the records of the *taxpayer*. Further, as Judge Tuttle also emphasized, this is not a case where a summons has been issued to the taxpayer himself seeking access to his books and information from his mouth. Neither is it a case where the summons is directed at the taxpayer's records in the hands of his attorney or his accountant, with the attendant questions of privilege, or even in the hands of anyone with whom the taxpayer has a confidential relationship of any kind. Each of the summonses here, we repeat, was directed to a third person with respect to whom no established legal privilege, such as that of attorney and client, exists, and had to do with records in which the taxpayer has no proprietary interest of any kind, which are owned by the third person, which are in its hands, and which relate to the third person's business transactions with the taxpayer.

III

Mr. Justice Clark, in Part II of his opinion for a unanimous Court in *Reisman*, 375 U. S., at 445–446, reviewed the statutory structure which Congress has provided for the issuance and enforcement of an internal revenue summons. It will perhaps be rewarding for us to outline that structure once again.

Section 7601 of the 1954 Code, 26 U. S. C. § 7601, directs the Secretary or his delegate "to the extent he deems it practicable" to cause Treasury Department officers or employees "to proceed . . . and inquire after and concerning" all persons "who may be liable to pay any internal revenue tax." The section thus flatly imposes upon the Secretary the duty to canvass and to inquire. This is an old statute. It has roots in the first of the modern general income tax acts, namely, the Tariff Act of October 3, 1913, c. 16, § II, ¶ I, 38 Stat. 114, 178, and

prior to that, in § 3172, as amended, of the Revised Statutes of 1878.

Section 7602 authorizes the Secretary or his delegate for "the purpose of ascertaining the correctness of any return . . . , determining the liability of any person for any internal revenue tax . . . , or collecting any such liability . . . [t]o summon the person liable for tax . . . , or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax . . . , or any other person the Secretary or his delegate may deem proper, to appear . . . and to produce such books, papers, records or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry . . . ."

Section 7603 provides for service of the summons. There is no provision for personal enforcement of the summons by the Secretary or his delegate. If enforcement is desired, he must proceed under § 7402 (b), or its sister and essentially identical statute, § 7604 (a), see n. 3, *supra*, each of which grants the district courts of the United States jurisdiction "by appropriate process to compel such attendance, testimony, or production."

Then, as Mr. Justice Clark pointed out, 375 U. S., at 446:

> "Any enforcement action under this section [§ 7402 (b)] would be an adversary proceeding affording a judicial determination of the challenges to the summons and giving complete protection to the witness. In such a proceeding only a refusal to comply with an order of the district judge subjects the witness to contempt proceedings."

Finally, § 7605 (a) provides that the time and place of the examination "shall be such time and place as may be fixed by the Secretary or his delegate and as are reasonable under the circumstances" and, with respect

to a § 7602 summons, that "the date fixed for appearance . . . shall not be less than 10 days from the date of the summons."

Thus the summons is administratively issued but its enforcement is only by federal court authority in "an adversary proceeding" affording the opportunity for challenge and "complete protection to the witness."

IV

Reisman was an action, instituted by attorneys for a husband and wife, for declaratory and injunctive relief against the Commissioner of Internal Revenue and an accounting firm which had been working on the taxpayer-couple's financial records at their request. The Commissioner had issued summonses to the accounting firm for the production of work papers and correspondence. It was contended that the enforced production of the papers was an unlawful appropriation of the attorneys' work product and trial preparation. The Court concluded that the petitioner-attorneys possessed an adequate remedy at law and that the complaint, therefore, was subject to dismissal. In reaching this conclusion, the Court emphasized the employment of the accounting firm by the attorneys "to assist them in connection with certain civil and criminal tax proceedings arising from the alleged tax liability of the" taxpayers; that the products of the joint work of the accountants and the attorneys "were kept separate in the accounting firm's files and labeled as the property of" the attorneys; that at the time of the service of the summonses "there were four civil tax cases pending in the Tax Court contesting alleged deficiencies" and, in addition, "a criminal investigation of Mr. Bromley on the tax matters was in progress."

The Court noted that the petitioners made no claim that § 7602 "suffers any constitutional infirmity on its face" and that the Government conceded that "a witness or any interested party may attack the summons before the hearing officer." The Court agreed. It went on to observe that "in tax enforcement proceedings the hearing officer has no power of enforcement or right to levy any sanctions"; and that "in any of these procedures before either the district judge or the United States Commissioner, the witness may challenge the summons on any appropriate ground." Among such grounds the Court included "the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution" or the defense that it is protected by the attorney-client privilege. It went on to say, "In addition, third parties might intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, may intervene" and that this "would be true whether the contempt be of a civil or a criminal nature." Finally, it said that there would be no difference should the witness indicate "that he would voluntarily turn the papers over."

Ten months later the Court decided *United States* v. *Powell*, 379 U. S. 48 (1964), and its companion case, *Ryan* v. *United States*, 379 U. S. 61 (1964). These concerned, respectively, internal revenue summonses issued to the president of a corporate taxpayer and to an individual taxpayer with respect to re-examinations and tax years for which assessments would be barred except for fraud. The Court was primarily concerned with the standards the Internal Revenue Service must meet in order to obtain judicial enforcement of its orders. It held that probable cause to suspect fraud was not required under the statutes and that the Commissioner

need show only "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed . . . ." Again it was emphasized that at the adversary hearing to which the taxpayer is entitled before enforcement is ordered, he may challenge the summons on any appropriate ground. It was also stated that the burden of showing an abuse of the court's process is on the taxpayer.

V

With all this as background, our central inquiry here is as to Donaldson's right to intervene in the summons proceedings. Donaldson had obtained preliminary relief (in the form of a temporary restraining order and, as to Mercurio, in the form of the succeeding preliminary injunction as well) in his self-instituted actions to restrain Mercurio's and Acme's voluntary compliance with Grady's request. But when the enforcement proceedings were instituted by the United States and Grady, the taxpayer was not successful either as to intervention or as to relief by way of restraint.

In his motion to intervene, and here (but apparently not at oral argument in the Court of Appeals, see 418 F. 2d, at 1215), Donaldson would take comfort from the provisions of Civil Rule 24 (a)(2).[8] He asserts that,

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[8] "Rule 24.

"INTERVENTION

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

within the rule's literal language, he possesses "an interest relating to the property or transaction which is the subject of the [enforcement] action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest," and that his interest is not adequately represented by the parties (Mercurio and Acme) to the enforcement proceedings. He would buttress this approach by reliance upon the reference to both § 7604 (a) and the Civil Rules in n. 18 in *Powell*, 379 U. S., at 58,[9] and by reliance upon language appearing in *Reisman*, 375 U. S., at 445.[10]

In our view, however, the taxpayer's argument goes too far in its reading of Rule 24 (a)(2) and of the quotations from *Powell* and from *Reisman*. The Civil Rules, of course, do have an application to a summons proceeding. Rule 81 (a)(3) expressly so provides.[11] But the Civil Rules are not inflexible in this application. Rule 81 (a)(3) goes on specifically to recognize that a district court, by local rule or by order, may limit the

[9] "Because § 7604 (a) contains no provision specifying the procedure to be followed in invoking the court's jurisdiction, the Federal Rules of Civil Procedure apply . . . . The proceedings are instituted by filing a complaint, followed by answer and hearing . . . ."

[10] "However, the Government concedes that a witness or any interested party may attack the summons before the hearing officer. There are cases among the circuits which hold that both parties summoned and those affected by a disclosure may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims . . . . We agree with that view and see no reason why the same rule would not apply before the hearing officer."

[11] "Rule 81.

"APPLICABILITY IN GENERAL

"(a) To What Proceedings Applicable.

"(3) . . . These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings."

application of the rules in a summons proceeding. See 7 Moore's Federal Practice, ¶ 81.06 [1], p. 4442 (2d ed.). This feature was recognized as purposeful by the Advisory Committee when the pertinent language was added to Rule 81 (a)(3) in 1946. 7 Moore's Federal Practice, ¶ 81.01 [6], p. 4413 (2d ed.). The post-*Powell* cases, too, are clearly and consistently to the effect that the footnote in *Powell* was not intended to impair a summary enforcement proceeding so long as the rights of the party summoned are protected and an adversary hearing, if requested, is made available. *United States* v. *Gajewski*, 419 F. 2d 1088, 1090–1092 (CA8 1969), cert. denied, 397 U. S. 1040; *Venn* v. *United States*, 400 F. 2d 207, 212, n. 12 (CA5 1968); *McGarry's, Inc.* v. *Rose*, 344 F. 2d 416, 418 (CA1 1965). We agree with that conclusion.

Similarly, the *Reisman* language set forth in n. 10, *supra*, does not guarantee intervention for the taxpayer. Certainly it recites that the proposed witness "or any interested party" may attack the summons before the hearing officer, as well as before the District Court in any ensuing enforcement proceeding, and certainly it recites that the party summoned and one "affected by a disclosure may appear or intervene" before the court. But this language, as well as subsequent comments in *Reisman*,[12] is permissive only and is not mandatory.

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[12] "Furthermore, we hold that in any of these procedures before either the district judge or United States Commissioner, the witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution . . . as well as that it is protected by the attorney-client privilege . . . . In addition, third parties might intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, may intervene." 375 U. S., at 449.

The language recognizes that the District Court, upon the customary showing, may allow the taxpayer to intervene. Two instances where intervention is appropriate were specified, namely, where "the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution" or where "it is protected by the attorney-client privilege." Thus the Court recognized that intervention by a taxpayer in an enforcement proceeding might well be allowed when the circumstances are proper. But the Court did not there pronounce, even when confronted with a situation concerning an attorney's work product, that the taxpayer possesses an absolute right to intervene in any internal revenue summons proceeding. The usual process of balancing opposing equities is called for.

We, thus, are not in agreement with the holdings or implications in *United States* v. *Benford*, 406 F. 2d 1192, 1194 (CA7 1969); *United States* v. *Bank of Commerce*, 405 F. 2d 931 (CA3 1969); and *Justice* v. *United States*, 365 F. 2d 312, 314 (CA6 1966), to the effect that, under *Reisman*, a taxpayer may intervene as of right simply because it is his tax liability which is the subject of the summons. Instead, we agree with the opposing conclusion reached by the Fifth Circuit here, 418 F. 2d, at 1218, and in *In re Cole*, 342 F. 2d 5, 7–8 (CA2 1965), cert. denied, 381 U. S. 950, and *O'Donnell* v. *Sullivan*, 364 F. 2d 43, 44 (CA1 1966).

VI

We turn, then, to Donaldson's particular situation. The material sought, as has been noted, consists only of Acme's routine business records in which the taxpayer has no proprietary interest of any kind, which are not the work product of his attorney or accountant, and which enjoy no established attorney-client or other privilege. Donaldson's only interest—and of course it looms

large in his eyes—lies in the fact that those records presumably contain details of Acme-to-Donaldson payments possessing significance for federal income tax purposes.

This asserted interest, however, is nothing more than a desire by Donaldson to counter and overcome Mercurio's and Acme's willingness, under summons, to comply and to produce records.

The nature of the "interest" urged by the taxpayer is apparent from the fact that the material in question (once we assume its relevance) would not be subject to suppression if the Government obtained it by other routine means, such as by Acme's independent and voluntary disclosure prior to summons, or by way of identifiable deductions in Acme's own income tax returns, or through Mercurio's appearance as a trial witness, or by subpoena of the records for trial. This interest cannot be the kind contemplated by Rule 24 (a)(2) when it speaks in general terms of "an interest relating to the property or transaction which is the subject of the action." What is obviously meant there is a significantly protectable interest. And the taxpayer, to the extent that he has such a protectable interest, as, for example, by way of privilege, or to the extent he may claim abuse of process, may always assert that interest or that claim in due course at its proper place in any subsequent trial. Cf. *United States* v. *Blue*, 384 U. S. 251 (1966).

We therefore hold that the taxpayer's interest is not enough and is not of sufficient magnitude for us to conclude that he is to be allowed to intervene. Were we to hold otherwise, as he would have us do, we would unwarrantedly cast doubt upon and stultify the Service's every investigatory move.

VII

This conclusion could dispose of the case, for our main concern here is with the taxpayer's asserted right to intervene in the particular enforcement proceedings.

Donaldson, however, strenuously urges, in addition, that an internal revenue summons proceeding may not be utilized at all in aid of an investigation which has the potentiality of resulting in a recomendation that a criminal prosecution be instituted against the taxpayer. He argues that a summons so used is invalid and unenforceable because it is outside the scope of § 7602. The Government naturally argues the contrary.

The argument centers in the above-mentioned dictum in *Reisman*, 375 U. S., at 449:

> ". . . the witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, *Boren* v. *Tucker*, 239 F. 2d 767, 772–773, as well as that it is protected by the attorney-client privilege . . . ."

We note initially that, despite the dictum, the courts of appeals in opinions issued since *Reisman* was decided, appear uniformly to approve the use of a summons in an investigation which is likely to lead to civil liability as well as to criminal prosecution.[13] The use of a summons also has been approved, even where it is alleged that its purpose is to uncover crime, if no criminal prosecution as yet has been instituted.[14] On the other hand, it has

[13] *Wild* v. *United States*, 362 F. 2d 206, 209 (CA9 1966); *McGarry* v. *Riley*, 363 F. 2d 421, 424 (CA1 1966), cert. denied, 385 U. S. 969; *Venn* v. *United States*, 400 F. 2d 207, 210 (CA5 1968); *Sanford* v. *United States*, 358 F. 2d 685, 686 (CA5 1966); *United States* v. *Hayes*, 408 F. 2d 932, 936 (CA7 1969), cert. denied, 396 U. S. 835; *United States* v. *Giordano*, 419 F. 2d 564, 568 (CA8 1969), cert. denied, 397 U. S. 1037; *United States* v. *Chikata*, 427 F. 2d 385, 390 (CA9 1970); *United States* v. *DeGrosa*, 405 F. 2d 926, 928 (CA3 1969), cert. denied, 394 U. S. 973; see *United States* v. *First Nat'l Bank*, 274 F. Supp. 283, 285 (ED Ky. 1967), aff'd, 390 U. S. 199.

[14] *United States* v. *Erdner*, 422 F. 2d 835, 836 (CA3 1970); *United States* v. *Michigan Bell Tel. Co.*, 415 F. 2d 1284, 1286 (CA6 1969);

been said, usually citing *Reisman*, that where the sole objective of the investigation is to obtain evidence for use in a criminal prosecution, the purpose is not a legitimate one and enforcement may be denied.[15] This, of course, would likely be the case where a criminal prosecution has been instituted and is pending at the time of issuance of the summons.

It is precisely the latter situation—where the sole object of the investigation is to gather data for criminal prosecution—which is the subject of the *Reisman* dictum. This is evident from the fact that the dictum itself embraces the citation of *Boren* v. *Tucker*, 239 F. 2d 767, 772–773 (CA9 1956), an opinion in which, at the pages cited, the Ninth Circuit very carefully distinguished *United States* v. *O'Connor*, 118 F. Supp. 248 (D Mass. 1953), a case where the taxpayer already was under indictment. The *Reisman dictum* is to be read in the light of its citation of *Boren*, and of *Boren*'s own citation of *O'Connor;* when so read, the dictum comes into proper focus as applicable to the situation of a pending criminal charge or, at most, of an investigation solely for criminal purposes.

Any other holding, of course, would thwart and defeat the appropriate investigatory powers which the Congress has placed in "the Secretary or his delegate." When Grady's summonses were issued to Mercurio and to Acme, Donaldson was not under indictment and, indeed, no recomendation had been made for his prosecution. That he might be indicted and prosecuted was only a

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Howfield, Inc. v. *United States*, 409 F. 2d 694, 697 (CA9 1969); *United States* v. *Ruggeiro*, 425 F. 2d 1069, 1070 (CA9 1970), petition for certiorari pending.

[15] *Wild* v. *United States, supra*, 362 F. 2d, at 208–209; *Venn* v. *United States, supra*, 400 F. 2d, at 210; *United States* v. *Roundtree*, 420 F. 2d 845, 851 (CA5 1969). See *United States* v. *O'Connor*, 118 F. Supp. 248 (D Mass. 1953).

possibility, no more and no less in his case than in the case of any other taxpayer whose income tax return is undergoing audit. Prosecution will necessarily depend on the result of that audit and on what the examination and investigation reveal.

We bear in mind that the Internal Revenue Service is organized to carry out the broad responsibilities of the Secretary of the Treasury under § 7801 (a) of the 1954 Code for the administration and enforcement of the internal revenue laws.[16] See Internal Revenue Service Organization and Functions, § 1112, *et seq.*, 35 Fed. Reg. 2417, *et seq.* (1970). We further bear in mind that the Service has district offices, each with an audit division and a criminal division; that the audit division's program emphasizes the civil aspects of enforcement but embraces "participation with special agents of the Intelligence Division in the conduct of tax fraud investigations," § 1118.4; that the intelligence division enforces the criminal statutes affecting income and certain other taxes and develops information concerning alleged criminal violations, § 1118.6; that each assistant regional commissioner for intelligence develops programs for the investigation of alleged tax frauds and "certain other civil and alleged criminal violations of the tax laws" and "approves or disapproves recommendations for prosecution," § 1114. (10); and that recommendations for prosecution are processed through the office of regional counsel and by that office to the Department of Justice, § 1116 (3). This demonstrates that the special agent may well conduct his investigation jointly with an agent from the audit division; that their combined efforts are directed to both

[16] "§ 7801. Authority of Department of the Treasury

"(a) Powers and duties of Secretary.—Except as otherwise expressly provided by law, the administration and enforcement of this title shall be performed by or under the supervision of the Secretary of the Treasury. . . ."

civil and criminal infractions; and that any decision to recommend prosecution comes only after the investigation is complete or is sufficiently far along as to support appropriate conclusions. The fact that a full-scale tax fraud investigation is being made does not necessarily mean that prosecution ensues when tax liability becomes apparent.[17]

Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct. The regulations are positive. Treas. Regs. § 301.7602–1 (c)(4). The underlying statutes are just as authoritative. Section 6659 (a)(2) of the Code defines the term "tax," as used in the Code and, hence, in the authorizing § 7602, to include any addition or penalty. Section 7602 contains no restriction; further, it has its ascertainable roots in the 1939 Code's § 3614 and, also, § 3615 (a)–(c), which, by its very language and by its proximity to § 3616 and § 3654, appears to authorize the use of the summons for investigation into criminal conduct. There is no statutory suggestion for any meaningful line of distinction, for civil as compared with criminal purposes, at the point of a special agent's appearance. See *Mathis* v. *United States*, 391 U. S. 1, 4 (1968). To draw a line where a special agent appears would require the Service, in a situation of suspected but undetermined fraud, to forgo either the use of the summons or the potentiality of an ultimate recomendation for prosecution. We refuse to draw that line and thus to stultify enforcement of federal law. See *United States* v. *Kordel*, 397 U. S. 1, 11 (1970).

[17] In 1969, 2,080 full-scale tax fraud investigations were undertaken. Only 1,049, or approximately half, of these resulted in recommendations for prosecution. In the 1,031 cases not recommended for prosecution, some $20,000,000 in deficiencies and penalties resulted and were earmarked for collection civilly. 1969 Annual Report of the Commissioner of Internal Revenue, pp. 28–31.

We hold that under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution.

Affirmed.

MR. JUSTICE BRENNAN, believing that under the facts of this case petitioner has established no right to intervene, concurs in the result.

SUPREME COURT OF THE UNITED STATES

No. 65.—October Term, 1970

Kevin L. Donaldson, fka Merton H. Sweet, Petitioner, *v.* United States et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January 25, 1971]

Mr. Justice Douglas, concurring.

The petitioner is the subject of an investigation by the Intelligence Division of the Department of Internal Revenue which seeks to obtain information regarding financial transactions between the petitioner-taxpayer and the Acme Circus Operating Company. Summonses have been served on Acme and its accountant, Mr. Mercurio, in order to obtain testimony and to review records relating to petitioner. The petitioner is attempting to prevent Acme and Mercurio from complying with the summonses and to prevent the Federal District Court from enforcing those summonses. He sought to intervene in the enforcement proceedings, alleging that he has a vital interest in the litigation and that the summonses are not enforceable because they were issued improperly, to gather information for a criminal prosecution. The Government challenged his right to intervene. The District Court denied his motion to intervene and enforce the summonses but stayed its mandate. The Court of Appeals affirmed but continued the stay pending disposition by this Court. As yet there has been no hearing before the special agent, and this Court rules only that such a hearing may proceed on the summonses issued.

On these facts, I concur with the Court's decision. There is nothing in the language of § 7602 to limit the issuance of summonses to civil investigations. There-

fore, even though petitioner is the subject of a criminal investigation, that is no bar to the issuance of the summons. It is true that a person who is summoned may object that the production of records or testifying would violate *his* rights under the Fourth or Fifth Amendments. And a taxpayer would clearly have standing to raise a violation of his constitutional rights if a third party were ordered to produce records belonging to the taxpayer. *United States* v. *Kordel*, 397 U. S. 1, 7; *Reisman* v. *Caplin*, 375 U. S. 440, 445. But it is difficult to see how the summoning of a third party, and the records of a third party, can violate the rights of the taxpayer, even if a criminal prosecution is contemplated or in progress. There is no right to be free from incrimination by the records or testimony of others.

The taxpayer may, however, protect his interests in any hearings held pursuant to § 7602. The Internal Revenue Service is clearly conducting a criminal investigation of the petitioner. That is the function of special agents.[1] The purpose of the summonses is to gather evidence for a criminal prosecution. At such "investigations" the summoned party may or may not be put under oath, at the discretion of the agent. He does have the right to be accompanied by counsel or an accountant. But the Internal Revenue Service has taken the position that the taxpayer who is being investigated is not entitled to be present at such "ex

[1] Though the Solicitor General argues that an investigation by a special agent might have civil as well as criminal results, and the final decision to prosecute is not made until after an investigation, and approval by a regional counselor, he admits that the special agent is only assigned to the case "as a result of some allegation or indication of criminal conduct." Indeed the Intelligence Division "enforces the criminal statutes . . . by developing information concerning alleged criminal violations thereof . . . ." Internal Revenue Service Organization and Functions, ¶ 1118.6, 35 Fed. Reg. 2454.

parte investigations."[2] Moreover, he normally is not given notice of the issuance of the summons to the third party. Our decisions, however, make clear that the taxpayer has the right to be present at the hearing and to confront and cross-examine witnesses and inspect evidence against him.

The traditional federal method for gathering such information is the grand jury. Before that body there is no right to counsel and confrontation, but other protections are present, none of which exist here. The Court in a five-to-four decision relied on the analogy to the grand jury in *In re Groban*, 352 U. S. 330, 333, ruling that a person has no right to counsel when ordered to testify before a fire marshal. MR. JUSTICE BLACK stated, I think, the correct view, in his dissent:

> ". . . any surface support the grand jury practice may lend disappears upon analysis of that institution. The traditional English and American grand jury is composed of 12 to 23 members selected from the general citizenry of the locality where the alleged crime was committed. They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney of law-enforcement officer ferreting out crime. It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury. Similarly the presence of the jurors offers a substantial safeguard against the officers' misrepresentation, unintentional or otherwise, of the witness' statements and conduct before the grand jury. The witness can

[2] An exception is made where the taxpayer asserts a privilege relationship with the person summoned, such as attorney-client.

> call on the grand jurors if need be for their normally unbiased testimony as to what occurred before them. . . . [T]he Fire Marshall's interrogation is, and apparently was intended to be, an important and integral part in the prosecution of the persons for arson or a similar crime. The rights of a person who is examined in connection with such crimes should not be destroyed merely because the inquiry is given the euphonious label 'administrative.'" 352 U. S. 346–347, 349.

In *Anonymous* v. *Baker*, 360 U. S. 287, another five-to-four decision, the Court upheld the power of a judge in New York, acting as a one-man grand jury, to interrogate a witness without benefit of counsel, again relying on the distinction between investigation and prosecution. *Id.*, at 294. MR. JUSTICE BLACK again stated the correct view in his dissent that this procedure allowed a state official to lay the groundwork for a future prosecution without the protection of the presence of counsel.

In *Hannah* v. *Larche*, 363 U. S. 420, registrars who were accused of racial discrimination asked to be allowed to confront and cross-examine witnesses appearing before the Commission on Civil Rights. A majority found no such right because the commission did not "adjudicate" or "issue orders" but only found facts. That criminal prosecutions might follow was "purely" conjectural." The Solicitor General relies on this case for approval of the procedures adopted by the Internal Revenue Service.

My view has not changed:

> "There is . . . only one way the Chief Executive may move against a person accused of a crime and deny him the right of confrontation and cross-examination and that is by the grand jury. 363 U. S. 497. . . .

> "They are the only accusatory body in the Federal Government that is recognized by the Constitution. I would allow no other engine of government, either executive or legislative, to take their place—at least when the right of confrontation and cross-examination are denied the accused as is done in these cases." *Id.*, at 499.

In *Jenkins* v. *McKeithen*, 395 U. S. 411, the Court dealt with another state investigative commission. There, however, the authority of the commission was limited to ascertaining facts regarding violations of *criminal* law and reporting its findings for criminal prosecution. There was no right to cross-examination for nonwitnesses and the right was limited for witnesses. The Court held that the commission exercised an accusatory function and was empowered to brand people as criminals. 395 U. S. 427–428. Therefore, due process required the commission to afford a person being investigated the right to confront and cross-examine the witnesses against him.

Given the identity of purpose of the investigations in *Jenkins* and this case, the rule of *Jenkins* clearly applies to the taxpayer in this suit. The requirements of procedural due process do not become more lax when federal rather than state criminal investigations are involved.

The proceeding contemplated in the summonses served on Acme and Mercurio is a criminal investigation. The result will be a determination of whether to bring criminal charges. The special agent will perform the function traditionally reserved to the grand jury in our Federal Government. The teaching of the *Jenkins* case is that such a proceeding may not be held without affording the taxpayer an opportunity to attend, to cross-examine, and to rebut.